



Case and Comment

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Courts and Practice

in

Denmark, Norway, and Sweden,

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DENMARK



THE Constitution of Denmark provides: The judicial power is vested in the courts. The Constitution does not provide for any specific court or courts, except indirectly, when it names the ordinary justices (Assessorer) of the Supreme Court as members of the Court of Impeachment for Ministers of State.

The courts are either ordinary or extraordinary. The latter may be created temporarily for the investigation and adjudication of special matters, but their proceedings and decisions are subject to appeal to the ordinary courts of appeal. They are but seldom created, as they are not popular, and are resorted to only in complicated cases, the attention to which, by the ordinary courts, would clog their general business. Epidemics of certain crimes in special neighborhoods, and fraudulent bankruptcies of large concerns, are practically the only cases which cause the creation of such extraordinary

courts. In some respects they correspond to our examiners and masters.

The ordinary courts are divided into general courts, having jurisdiction over all cases within their scope and territory, except such as have been specifically excepted, and special courts, having jurisdiction over such cases only, as have been specifically referred to them by the acts creating them. An action belonging in the general courts you cannot bring before a special court, but, the parties agreeing, you may bring a special court action in the general court. The special courts are sometimes known as extra courts.

The foundation stone of the judicial system is not the Supreme Court (with the lower courts as subordinate members) but the ordinary general courts of first instance in the various districts, the so-called "Ting." There are three different kinds of Ting: the Herreds-Ting (the hundred court), the By-Ting (courts of the towns) and the Birke-Ting. There is now no difference between the Herreds-Ting and the Birke-Ting, except the name. Birke-Ret was a separate kind of law governing trading places and a certain country district surrounding them,

but the trading places have been swallowed up by the towns, and the Birke-Ret by the By-Ret (town law), while the country districts have been segregated and are governed by the same law as all other country districts. By-Ret as a separate kind of law does not exist any more, either, except in so far as municipal regulations are different in towns and in country districts. All of these three courts are direct and continuous descendants of the old popular assemblies, and have retained the name "Ting" under which these were known.

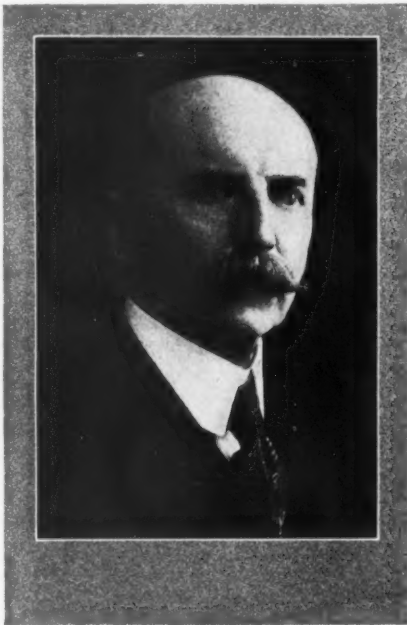
Each court is constituted by one judge, one scribe (clerk), one crier, and two witnesses. These latter are a curious, and now absolutely useless, remnant of the "free men of the Herred (Birk, By)," who used to attend the Ting. They are paid a small salary, and are appointed by the provincial assemblies for three or four years at a time, from among deserving but poor old men of the district. They sleep through the proceedings, and at the end sign their names to the minutes. They were supposed to represent the majesty of the people, and as such to keep the King's judge straight. This they now do by helping him on with his coat and rubbers, when it is time to adjourn.

There are no juries in Denmark, and never were any, in the English sense of the word. In the old popular courts the free men attending decided the cases; but inquisitions became known, the so-called "Naevn" (those named by the Ting), who investigated and reported

back to the Ting. These have survived. Where the question is about damages, you can either, pending your case, have a "Naevn" (to uvillige Maend-two impartial men) appointed to examine and report back to the court, or you can prove to the court that damages have been suffered, whereupon the court will render judgment for you for such an amount of damages as two impartial men appointed by the court shall report to have been suffered. Their appraisal is called "Skjøn," which means estimate. At the meetings of the Naevn both sides may appear, examine and cross-examine witnesses, produce documentary evidence, etc., all of which the Naevn will include in their report. The report must be sworn to in open court. Either party may demand an over-Skjøn by double the number of the original Naevn.

The procedure is now all in writing, and in many ways greatly resembles the old English equity procedure. The system rests on a law of June 4, 1796, with later amendments.

Before you go into court, you must call your opponent before the Forligs Kommission (commission of conciliation). If a settlement (Forlig) is reached, it has the effect of a final judgment, and a writ of execution may issue thereon. If Forlig cannot be reached, the commissioners will hand you back your complaint, with attestation stamped thereon, that conciliation has been tried in vain. Then you take out your summons. This may be, but generally is not, issued by the court, but by the party



AXEL TEISEN

or his attorney. By it the defendant is warned to be in court on a certain day to see and hear the plaintiff present his case against him for (short statement of the cause of action), to answer, or else to suffer judgment for the amount claimed, with interest and costs.

Each court has one session, on a fixed day, each week, and the summons must read to appear on that day in the week. Where I used to practise we had three different jurisdictions using the same courthouse. Every Monday, Thursday, and Friday, a little before 10 o'clock, the streets of the town would become quite brightened up by a procession of us lawyers, all in our top hats, yellow kid gloves, canes (fur coats during winter), and with our portfolios bent under our left arms, marching up towards the hall of justice. By the way, I have never been able to persuade myself to buy one of the stiff portfolios with a handle, now in use here. When I came to the bar 'way back in '82, this kind was just going out of fashion in Denmark, and a new kind made of soft leather was coming into use. These you could bend like a magazine and carry under the arm, and they looked ever so much more "dignified." But the "old man" in the office had three or four of the stiff kind, perfectly good, and he insisted that I should use one of them. I have had a grudge against the stiff portfolio ever since, and still carry my green bag.

Having arrived at the courthouse, what did we do? Very little. Court having been opened, the clerk would first read a list of all deeds, mortgages, and other papers left with the court for record. Next, all judgments rendered by the court since last court day. Then the court would call for new cases. You stepped up to the desk, and dictated to the clerk, that you appeared for A. B. and desired, on his behalf, to commence action against C. D. (incriminated your case) and for this purpose filed: Complaint to the Conciliation Commission duly referred, summons, duly served, and your brief of deduction (statement of claim, stating the facts and the law upon which you relied). Upon the basis thereof you demanded judgment. We did not pay any costs at the time. The court

would send us bills every quarter, and—we paid them. Defendant's name would then be called. Up would step his attorney, and request that the papers (the acts) of the case be lent him, and that he be granted two weeks to answer. We had no trouble from having the original papers pass from the hands of the court into those of opposing counsel. If either of them should "lose" any of them, the effect would simply be that they, for the purpose of the proceeding now pending, had contained what the other side said that they did contain.

Two weeks later we would both be there, top hats, gloves, canes, portfolios and all. Then defendant's counsel would return the acts and file his brief or answer; that is, he generally didn't, but asked for further continuance, claiming that a very important matter had compelled him to go out of town, that his client had been sick in bed, that he was expecting some important documents, etc., etc., giving one or the other of the thousand and one excuses which form part of the legal education everywhere on the face of the globe.

But suppose he did file his answer; then plaintiff's counsel in turn would borrow the papers, and get a continuance for a week or two. On the day fixed, he would come back and say that defendant's answer disclosed that facts were in dispute, and for that reason he would need a further continuance for the purpose of producing his proof.

If the value of the case was under a certain amount, you could produce your witnesses for examination under the same case. But if it was higher, you had to commence a new action for the purpose of taking testimony,—something like a commission. The reason for this was simply one of revenue, and dates from the bankruptcy of the State Treasury caused by the Napoleonic Wars. Another reason was that you could not drag a witness from his own jurisdiction. In the case referred to, three courts with jurisdictions over different territories held their sessions in the same courthouse. If a witness living in one jurisdiction was wanted in a case in one of the others, we had to bring him before his own court, on the theory that

he could not be dragged away from his own jurisdiction,—but in two cases out of three he actually had to travel out of his own court's territory into that of one of the other two, and in the remaining case he stayed in his own court's territory, even if he appeared before one of the other two courts.

In starting your "Tingsvidne-Sag" (Court-witness-Case) you issued a summons (*subpœna*) to the witnesses to appear in court on a day certain, under "Falsmaals Bøde," under threat of fine, if he did not appear. On the day fixed you appear in court and produce: Your summons in the original case, showing that a case is pending; also your referred complaint to the Conciliation Commission, showing that conciliation has been tried in vain; your summons to the witnesses duly served; and, on separate sheets, the questions you desire to have put to each witness. The first witness is then called. The court takes up the list of questions for him, and puts them to him one after the other, and his answers the court dictates to the clerk, who enters them in the minutes. All the questions having been put and answered, you may dictate to the minutes further questions occasioned by the answers of the witness. When they have been disposed of, then up steps defendant's counsel, and dictates to the clerk his cross-questions. The judge puts them to the witness, and dictates his answers to the clerk, whereupon plaintiff in the same way may re-examine the witness, and defendant cross-examine him thereon, all in the same way. If you cannot get through with all your witnesses on that day, you obtain a continuance. When you are through with all your witnesses, you ask for an exemplification of the proceedings, which you file in the original case. Defendant may start a separate "Tingsvidne-Sag" of his own, but generally counsel arrange to hear the witnesses on both sides on the same day and under the same proceeding.

Did we ever get through with a case in this way? *Mirabile dictu*, we did, and it did not take us so very long, either, say six months on an average. The reasons may be said to be, first, that we did not have any forms. Under Dan-

ish law, a bill of exchange and a promissory note, in order to be treated as such before the court, must contain the word "vexel," but that is about the only fixed form in existence. Appeal-summons to the Superior Courts and the Supreme Court were always alike, because they were prepared by the clerks of the courts, but for no other pleadings were there any fixed forms. Second. Our statements of claim and answers were entirely narrative, and we set forth, not only the bare facts, but the circumstances (the evidence as it is called with us), and the rule of law upon which we relied; the issue was quickly determined, and it was often found that the whole case rested upon a point of law. Third. We had no rules as to the admissibility or inadmissibility of evidence. Whether the evidence produced was relevant or not was determined by the judge when he decided the case; there being no juries, there could be no interest in sifting the evidence while being produced. For these reasons, demurrers, exceptions, motions for new trials, *et omne id genus*, were unknown.

What kind of law did the courts hand out? Generally good law. In order to become a judge, you must have had a full academic education and be, at least, a bachelor of philosophy and of law (*candidatus philosophiæ et juris*). Practically no man ever came on the bench before he was forty, and of the fifteen to eighteen years since his graduation he had generally spent the first three or four at the bar, and the balance in the ministries of justice or of the interior. There he had learned the practical side of life, to sift facts, and to determine cases according to their equities, and not according to their technicalities. Comparatively few cases were appealed, and much fewer, even, would have been appealed, except for the fact that the *summa appellabilis*, both to the Superior and Supreme Courts, was very low, and that the costs of appeal were not very heavy.

Procedure in the Superior Courts is entirely by briefs, reviewing the evidence and the law. A full record of all the proceedings in the Ting is filed. In the Supreme Court a full record of the proceedings in both of the lower courts

is filed, and the attorneys in addition prepare and have printed "extracts" thereof, to suit their respective purposes, but the arguments are oral. Here is the only chance for a Danish lawyer to show his oratorical powers in court; but as he pleads to thirteen elderly wise men, he is generally sane enough not to indulge in any very extended flights of that character.

The special courts use the same procedure, except that notices are shortened, the court itself tries to accomplish the conciliation, and certain defenses are excluded. The admiralty courts have a special procedure of their own.

On the criminal side, the procedure is almost entirely inquisitorial. The police prepares the case, sends an exemplification to the Amtmand (highest civil authority within a certain Amt, or district). He decides whether the accused shall be indicted or not, and in the former case appoints one lawyer as actor and another as defender of the accused. There are no district attorneys. The procedure is by written briefs. Appeal may be taken in almost all cases to the Superior Courts, and in a great many to the Supreme Court. By the Penal Code it is enacted that every person convicted of crime shall be responsible in damages, and that the damages shall be determined by the judgment of conviction. Where the injured party demands it and proves his claim, the sentence passed on the criminal will also fix and order him to pay the damages.

The Danish Constitution of June 5, 1849, promised that both the civil and criminal procedure should be reformed, and that juries should be introduced in all criminal cases, and in all cases for slander, libel, and abuses of the press. A number of commissions have, from time to time, been appointed to prepare the necessary legislation, and have made their reports, but so far the two Houses of the Rigsdag have been unable to agree.

There is a great deal of dissatisfaction with the existing criminal procedure, while the civil procedure, notwithstanding its apparent defects, works to tolerable satisfaction.

NORWAY

During the current year, laws have been passed reforming the procedure, which are to go into effect in 1915, but we have been unable to see the text, and cannot tell their scope.

Not considering this reform, the civil form of procedure is the same as in Denmark, resting upon the same law of 1796 (when Denmark and Norway were one country), although the names of the courts are somewhat different.

The criminal procedure was reformed by an act of 1887. The serious crimes come before the Lagmands Ret, consisting of three judges and ten lagrette-maend (jury). The latter decide the facts, the former the law. If, during a trial not more than one of the judges or one of the lagrette-maend, or of both, shall become unable to continue, this will not cause a mistrial, the remaining number can dispose of the case. The great majority of cases come before the Meddoms-Retter, composed of one judge and two domsmaend. These act jointly and decide both facts and law.

The new acts are said to have made the jury system universal.

SWEDEN

The Swedish organization of its courts, and the form of procedure, show more traces of the old Teutonic customs than those of any other country.

Here, also, there is a division between town and country, the country courts descending directly from the old Ting, the town courts being something which was added afterwards, as towns and cities grew up.

The whole country is divided into a number of judicial districts (Domsagor). Each city is a district for itself, and its court is called Rådstufvarätt (City Hall Court). The country is divided into a number of Härad or Tingslag, and each such may be a separate judicial district, or several of them may form one; the court is called Häradsrätt.

The city court is presided over by the Borgmästare, a lawyer appointed by the King, and has a variable number of Råd-män, elected by the electors. It is not absolutely necessary that the latter should

be lawyers; in certain places so-called "illitterati" may hold the position.

The Håradsrätt consists of the Håradshöfding and twelve Håradsnämnd. The first must be a lawyer, and is appointed by the King; the latter are laymen, and are elected in a special way by the electors of the district. The President is also called Domare (Judge).

There are three superior courts, each being a court of revision for cases arising within certain districts. The general name for these is öfverrätter, but the special name is Hofrätt.

The highest court of appeal is Konungens Högsta Domstol (The King's Highest Court), which has this remarkable peculiarity about it, that the King in person may attend and take part in the decision, when he is given two votes; consequently he may decide the case, but he may also be outvoted in his own court. However, this right has not been exercised for a hundred years, although it is reserved by the Constitution.

The form of procedure is in many respects like that in Denmark, commencing with a summons, and mostly carried out by written briefs. There are, however, more traces of oral pleading left, and it is often required that the written pleadings be read aloud in court.

As to production of evidence, all witness sit long enough to dispose of the case are required to appear before the trial court. They are examined orally, but their answers are dictated by the judge to the minutes, and then read to the witness for his approval.

The city courts meet every Monday, and sit long enough to dispose of the business then before them. The country courts have a winter term and a fall term, commencing on a certain Monday, and continuing for a certain number of Mondays thereafter. When these ordinary court days are not sufficient to dispose of the business, and for certain special business, the court appoints certain Urtima Ting (Out-of-time Courts) for the transaction of such business.

When a case is ready to be finally disposed of (to go to doom), the procedure is different, according as it arises in a city or a country court.

In the former all of its members vote, and no preference is given to the president. The most recently appointed or elected member votes first, the rest follow in order. In case of a tie, the vote of the oldest member (whether Borgmästare or Rådman) decides. The same rules govern the disposal of all cases in the courts of appeal.

In the country courts, however, the Håradsnämnd have not been present while the case is being tried. But after its submission, the judge calls the nämnd, reads and explains to them all the acts of the case, whereupon a vote is taken. If the nämnd are unanimous, their opinion prevails, whether the judge agrees or not; but in the opposite case, the judge's opinion stands, whether a majority or only a minority of the nämnd agree with him.

Appeals *quoad realia* are called "Vad," the same word as "wed," "ved," "vaeth,"—a bet. The old way was actually, that the losing party entered into a bet with the judge, or with the nämnd, that the case would be reversed on appeal. He thereupon deposited his vadepénning (forfeit), and the judge or nämnd put up a similar amount.

Like in Norway and Denmark, there exist a number of special courts having jurisdiction over special subjects, such as admiralty and commercial courts.

There are a number of other interesting peculiarities connected with Swedish practice, but space will not allow us to go into further details.

Criminal cases are tried before the same courts which decide civil cases, and the forms of procedure are not particularly different. In other words, there is less of the inquisitorial and more of the accusatory principle at work than in Denmark. But, on the other hand, practice has, in the course of time, made the case depend on what is down in writing: *quod non in actis, non in mundo*.

Frutensen



—Photo by Brown Bros., New York.

THE KING'S LIBEL CASE

Sir Arthur Bigge, one of the King's private secretaries, giving evidence.

The Courts of Great Britain

BY HYACINTHE RINGROSE, M. A.,

Author of "The Inns of Court"



THE judicial bench is the best and soundest of English institutions. Mr. Carpenter, speaking in the Senate of the United States, said: "In no other nation on earth is the law after it is made so impartially applied to all classes of society as in England. Wealth and influence, even noble blood, give no immunity to crime in a British court. The rich and the poor, the nobleman and the peasant, a prince of the blood and a scavenger of London, stand on a perfect level at the bar of justice in a British court."

The administration of justice accord-

ing to a rational and uniform standard is an immense task, which the courts of England have undertaken with remarkable success.

There is no room in this article for an historical description of the judicial systems of England, so we shall limit our task to a consideration of its present constitution and practice.

There are three divisions of the High Court of Justice, the Chancery Division, the King's Bench Division, and the Probate, Divorce, and Admiralty Division. The Chancery Division deals with the administration of the estates of deceased persons, the administration of trusts, actions for the foreclosure or redemption of mortgages, partnership actions, actions for specific performance, the administra-

tion of the property of infants, the rectification of deeds, and certain other matters. The King's Bench Division deals with actions to recover debts and damages, actions to recover the possession of land, premises, or goods, applications for writs of mandamus and certiorari, questions relating to the revenue, appeals from County Courts, and from Quarter Sessions.

The Probate, Divorce, and Admiralty Division deals with the grant of probate and letters of administration, divorces, salvage actions, actions for damages caused by collisions at sea, and other admiralty actions.

The High Court of Justice consists of twenty-two judges, six of whom are allocated to the Chancery Division, fourteen to the King's Bench Division, and two to the Probate, Divorce, and Admiralty Divisions. The President of the High Court is the Lord Chancellor, who receives a salary of £10,000 a year. The Vice President is the Lord Chief Justice, who receives a salary of £8,000 a year. Each of the ordinary judges (technically termed *puisne judges*) receives a salary of £5,000 a year.

The central offices of the High Court are situated at the Royal Courts of Justice, Temple Bar, London; but there are various district offices, called district registries, which are situated in the large provincial towns.

The judges of the Chancery Division are assisted by twelve masters of the High Court (four masters being allocated to each two judges), and a staff of clerks who take accounts and deal with other matters of detail.

The judges of the Chancery Division are also assisted by registrars, who draw up their orders, and by taxing masters, who tax the costs of parties.

Certain of the business in the King's Bench Division is also transacted by masters of the High Court.

Both in the Chancery and the King's Bench Division, actions involving questions of account, or intricate inquiries, are frequently referred to officials known as official referees. The court has also power to invoke the assistance of assessors, or special referees having special knowledge of the matters in dispute.

Certain business is transacted by what are known as Divisional Courts, sitting in the King's Bench, and the Probate, Divorce, and Admiralty Divisions, respectively. A Divisional Court is a court composed of two or more judges.

The Court of Appeal consists of five Lords Justices, each of whom receives a salary of £6,000 a year. The Lord Chancellor, the ex-Lord Chancellors, the Lord Chief Justice and the President of the Probate, Divorce, and Admiralty Division, occasionally assist the court when any of the Lords Justices are absent through illness or otherwise. The Court of Appeal usually sit in two divisions, each consisting of three judges. One division deals with appeals from the King's Bench and Probate, Divorce, and Admiralty Divisions, and the other with appeals from the Chancery Division.

The courts sit during four periods in the year, each of which is called a sitting. The sittings are as follows:—The Hilary Sittings, which commence on the 11th of January, and terminate on the Wednesday before Easter; the Easter Sittings, which commence on the Tuesday after Easter week, and terminate on Friday before Whit-Sunday; the Trinity Sittings, which commence on the Tuesday after Whitsun week, and terminate on the 31st of July; and the Michaelmas Sittings, which commence on the 11th of October, and terminate on the 21st of December.

At certain periods of the year the judges of the King's Bench Division travel around the country to try prisoners and to hear civil cases. These journeyings are known as "the Circuits." The sittings of the judges when they are away on circuit are known as the "Assizes." Assizes are held in each county, and the county town, under the superintendence of the High Sheriff. In some counties the Assizes are held three times a year, and in others four times a year.

Besides the great courts of law, which, like the foregoing, have jurisdiction all over the Kingdom, there are a number of courts exercising local jurisdiction within counties, boroughs, and other defined districts. Among such tribunals are the Central Criminal Court of Lon-



— By Permission Boston Photo News Co.

TRIAL AT PORTSMOUTH, ENGLAND, OF ALLEGED GERMAN SPY

don, the Middlesex Sessions, and the Surrey Sessions.

The recently created Court of Criminal Appeals is of special interest. It consists of three judges of the High Court of Judicature, one of whom is often the Lord Chief Justice. The procedure of this court is modern and simple in the extreme, and its methods deserve the study of American students of comparative judicature. The best feature of the Court of Criminal Appeal is that the judges hearing an appeal dispose of, and finally decide one case at a time; and do not take up a new case until they have determined the one just argued. The person most interested in the appeal—the defendant—is allowed to be present when his cause is brought on, and may be heard orally by the court, even on matters outside of the record, if justice so requires.

Legal practitioners in the English

courts are divided into two principal classes, called barristers, and solicitors. The barrister, who must be called to the Bar or licensed by one of the four ancient Inns of Court, alone has the right to act as an advocate in the various branches of the High Court. The solicitor, or attorney at law, is not a member of the Bar, but he is the lawyer of record for the plaintiff or defendant, and he alone has the legal right to institute and manage proceedings at law. Otherwise stated, the solicitor is what we call in New York an "office lawyer," while the barrister does the work allotted by us to "trial counsel."

Though Scotland is an integral part of the United Kingdom, its law and judicature differ widely from the English law and courts. The common bond between the courts of law in England, Scotland, and Ireland (for Ireland has separate courts, and to some extent a dif-

ferent law), in the House of Lords sitting as an appellate tribunal, at Westminster. In deciding appeals, of course, it administers English, Scottish, or Irish law, as the case may be. The influence, however, of one strong court, generally composed of the ablest and most experienced lawyers of the land, dealing with systems of law often alike in their principles, and differing only in the mode in which they are applied, tends to harmonize the law of the United Kingdom, and prevent unnecessary divergence in developing principles that are common to all.

The word "advocate" is used technically in Scotland, in a sense virtually equivalent to the English term "barrister."

The Faculty of Advocates is the collective term by which the members of the Bar are known in Scotland. This corporation corresponds with the Inns of Court in London, and the King's Inn in Dublin.

The Bar of Scotland takes pride in remembering that a Scotsman, Lord Erskine, was probably the greatest forensic orator that has so far appeared in the history of Great Britain. Erskine should be canonized by our profession because of the vigorous and dignified stand he always took for the independence and righteousness of the Bar.

The official law school of Ireland is known as the King's Inn, and is situated in Dublin. This society, which corresponds closely to the English Inns of Court, has the exclusive privilege of calling candidates to the Irish Bar.

In discipline and professional etiquette the members of the Bar in Ireland differ but little from their English brethren. The same style of official costume, the wig and gown, is required, and the same gradations of rank exist. Such is their order of importance, Attorney-General, Solicitor-General, King's Counsel, and ordinary barristers.

Wales has no system of law or judiciary distinct from England, as Scotland, Ireland and the Isle of Man have. The Welsh barrister is called to the Bar, like his English brother, by some one of the four Inns of Court in London.

We have reserved for the conclusion

of this article a short discussion of the supreme appellate legal tribunal of Great Britain and Ireland, the House of Lords. The English Parliament has always been the highest court of justice in the Realm, but its strictly judicial powers have been always exercised by the Lords only. The Commons, in virtue of their petitioning power, have become denouncers and accusers; but they have never become judges. Whenever the Commons have taken part in action which was practically judicial, it has always been under some other form, generally as legislative acts. Strictly judicial functions like those of the Lords they have never claimed.

Since the beginning of the fourteenth century the House of Lords has been in use to review the decisions of the English courts of law, on questions of law, but it was only at the end of the seventeenth century that their right to review judgments of the Courts of Chancery was conceded. In 1675 there was an angry and protracted discussion between the House of Commons and the House of Lords, in a case in which a litigant appealed against a judgment of the Court of Chancery, a member of the Commons having been the successful respondent.

The British Constitution is full of seeming anomalies, and one of these is that the House of Lords, an hereditary chamber of notables, is the supreme legal tribunal of the land. In theory, the whole House adjudicates, but, of course, the only members who take part in the decisions are the "Law Lords," that is, the Lord Chancellor, and the ex-Lord Chancellors, with any other peers who have held high legal appointments—usually forming a bench of three or four members.

The supreme appellate tribunal in ecclesiastical cases, and in appeals from the law courts of the Colonies, is the Judicial Committee of the Privy Council, composed partly of law peers and partly of retired judges from the home or colonial bench.

England is justly proud of its judicial history. Complaints may be heard of the machinery by which justice is administered, but the complaints resolve themselves into the allegation that the courts

have not time to get through all the affairs which ought to come before them. These complaints are therefore testimony to the high character of the judges. What every suitor wants is that his particular case should be tried by a judge of the superior courts. It is common enough for the judge to insist upon a case being referred, but every suitor wishes to leave his case to the decision of the court. No one, in fact, dreams of complaining that the judges are incompetent, for such a complaint would be obviously unreasonable. The Bench are, as a body, the picked men of the legal profession. The Bar itself may need reform, but the judges represent the very best side of the Bar. English judicial institutions are so arranged as to insure that the best legal talent of the country shall be available for judicial duties; and more than this could not be achieved by any conceivable arrangement.

The character, again, of the bench, is no less remarkable than their talent. They possess the virtues of incorruptibility, of impartiality, and of high-minded integrity, in such perfection that to

compliment a judge on the possession of these merits would be either an insult or an absurdity. The result of this high character has been to inspire a feeling of unlimited popular confidence. When the House of Commons wished to render effective the laws against bribery, no better course suggested itself than to transfer to the judges the delicate functions exercised by election committees. The Bench attempted, on grounds to which the public never did full justice, to decline a difficult and invidious task; but the nation thrust on the highest judges powers and responsibilities which they would gladly and perhaps wisely have declined. Nor is English respect for the judges due to national vanity. On such a subject no testimony can be of greater value than the opinions of American jurists who have observed the splendid workings of the English Bench.

H. B. Ringrose.



VENICE MURDER TRIAL

— Photo from Brown Bros., New York.

The Courts of Germany

BY FRED H. PETERSON

of the Seattle (Wash.) Bar



WITHIN the limits of this sketch it is only possible to give a general view of the German courts, and to point out a few salient features that may interest the legal profession. German law is based upon the civil law. While we are discussing the propriety of codification, courts in Germany have for years administered code law successfully. This was effected through the Imperial Constitution adopted April 16, 1871, which reserves to the Empire the authority to legislate "with respect to the whole domain of civil and criminal law and legal procedure." (art. 4, sec. 13.) Accordingly, through imperial legislation, laws have been enacted which secure uniformity in the administration of justice throughout the Empire. Germany possesses uniform Civil, Criminal, Commercial, and Bankruptcy Codes. The present Civil and Criminal Codes became effective January 1, 1900. The Imperial codes and laws are enforced by the respective states, for Germany has no Federal courts, except the Reichsgericht, located at Leipzig, which is the equivalent of our Federal Supreme Court. In brief, the administration of justice is delegated to the respective states and free cities, regulated by Federal laws.

But this does not mean that the various states have no authority to legislate; on the contrary, all local matters, and various subjects upon which the Empire has not legislated, or has no authority to legislate, are left free to state legislation. As with us, when Congress enacts a bankruptcy law, all state insolvency laws are suspended. 45 L.R.A. 186, note IV.

Since the courts are established by the law of the Empire, we find the same system of courts and procedure everywhere in Germany. A brief outline is the following:

The Amtsgericht.

First, the "Amtsgericht," or "County Court," which has original jurisdiction of all suits about property not to exceed 300 marks, or \$75, between landlord and tenant, master and servant, common carriers, freight charges, probate of estates, and various minor matters. This court has for the trial of misdemeanors a department known as "Schoeffengericht," for which we have no equivalent. The name comes from "Schoeffe," whose duties are those of a lay judge. When court is held the county judge presides, and with him two "schoeffen." The three hear the evidence; any two may decide upon the defendant's guilt. But after the decision, the judge alone determines the penalty. The schoeffen are selected the same as jurors,—from the substantial citizens,—and the service is regarded highly honorable, but without compensation.

I attended four trials in the Schoeffengericht at Hamburg. The proceedings were very methodical, the defendant allowed every right under the law; even technicalities were invoked in his favor by the presiding judge. By this I mean he was tried strictly according to law. In three cases, acquittals were granted, and the other was moderately sentenced. No one was represented by counsel, although each defendant was asked if he desired an attorney. The court was assisted by the state's attorney and a referendar,—a young lawyer, who acted as clerk.

The procedure, in brief, was this. The defendant was called before the judge, who read a short statement furnished by the police, giving age, occupation, character, previous conduct, etc.; the defendant answered as to its correctness. He was informed of the charge, and the section of the Code applicable to his case was read to him; he was asked if he wanted counsel; then he was told he could have a trial at once.

or at some future time. Everyone demanded an immediate trial. The state's attorney called the witnesses, and was absolutely fair in his examination. It seemed as if he were anxious to do justice, and not merely to obtain a conviction. The judge freely put questions

which would have a tendency to excuse the defendant, or acquit. The witnesses were sworn, but not the defendant. After the evidence, the state's attorney would rise, state the charge, refer to the Criminal Code; then show what must be proven to convict, and would review the evidence impartially, expressing an opinion to the court whether the defendant should be convicted or acquitted. The judge, the two schoeffen, and the referendar, then retired to a private room, and in a short time returned with a written

statement reciting the offense, the Code sections applicable, proof offered, and the reasons specifically set forth why an acquittal or conviction should be had. This was then read to the defendant, and, if convicted, sentence was at once imposed. The entire procedure was absolutely fair, very deliberate, exceedingly methodical, and justice administered "without fear or favor."

The Landgericht.

The second court is the "Landgericht," like our superior, circuit or district courts, with general jurisdiction. Criminal jurisdiction is exercised in a department known as "Schwurgericht," or "jury court." Three judges preside and

twelve jurors. One or more alternate jurors are chosen to deliberate upon a verdict, as substitutes, if any of the twelve should become incapacitated. Another department is known as the "Handelsgericht," or commercial court, presided over by one judge and two laymen

known as "Handelsrichter,"—commercial judges, nominated by commercial bodies, and appointed by the government. Any German is eligible who is registered as a merchant, thirty years old, and otherwise qualified as specially provided by law. Only commercial cases are sent to this department, upon motion of either party. I witnessed a trial between merchants, and was much pleased with the speedy method of determining the case. In fact, the commercial court offers a trial before the judge and a jury of two, as

a jury of two, as the Schoeffen court affords a trial in minor criminal matters before a judge and a jury of two. As the persons selected are intelligent business men, such trials are very satisfactory.

Instead of submitting technical business questions to a jury, who in all probability never heard of the like before, and then offering the testimony of experts on each side of the case, which often has a tendency to confuse the jury rather than to enlighten them, the German commercial judges possess personal experience in business, and skill in affairs of commerce, of the greatest value in arriving at correct conclusions; besides, the procedure, as a rule, is brief and to the point, and causes little delay to the liti-



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gants. So far as I could observe, this system worked very satisfactorily.

The Oberlandesgericht.

The third court is the "Oberlandesgericht," or appellate court, which exercises appellate jurisdiction only, and is divided into civil and criminal senates. In Bavaria there are two appellate courts, so that Kingdom has another court known as the "Obersteslandgericht," which means highest or supreme court. These appellate courts exercise much the same jurisdiction as our state supreme court, or court of appeals. But the three republic cities, Hamburg, Luebeck, and Bremen, have only one supreme court, located at Hamburg, where a magnificent building is in course of construction for this court.

The Reichsgericht.

The fourth is the "Reichsgericht," located at Leipzig, which is the Imperial Court of Germany, like the Supreme Court of the United States. But there is a great difference in the appointment of judges, in that the "Bundesrat," or Senate, nominates the judges, and the Emperor appoints the nominee. All other judges are appointed by the respective states. The Reichsgericht has jurisdiction over patents, consular matters, where local courts have passed on cases arising under imperial law, etc.

The Reichsgericht has not attained the importance of the United States Supreme Court, largely because the power of declaring laws unconstitutional does not appear to be vested in that court. According to the German idea the Emperor and his Chancellor determine whether a proposed law is within the Constitution; if deemed unconstitutional it is not enacted into law. The method pursued is substantially as follows:

The two legislative bodies of the Empire are the Bundesrat, or Senate, and the Reichstag, or House of Representatives; and, as with us, a majority of each must consent to a bill to become a law. If an act is passed by the Bundesrat, it becomes the duty of the Emperor to transmit it for further action to the Reichstag; but he may then exercise his right, and refuse to transmit it to the

other legislative body, upon the ground that it is, as we term it, unconstitutional; but he may not refuse upon any other ground, such as that it is impolitic or inexpedient. On the other hand, if a bill is first passed in the Reichstag, it becomes the duty of the Chancellor, who presides in the Reichstag, to transmit the bill for further action to the Bundesrat, and he may refuse to do this, upon the ground that the bill is unconstitutional, but for no other reason.

In this way, acts deemed unconstitutional and void, if passed by either House, are withheld from final passage, and of course the question of constitutionality cannot be raised in the courts. This system is preferable, according to the German idea, in that every act of the law-making power is valid from the date of passage, while with us a statute may be on the books for years, apparently a valid law, and then may be declared unconstitutional and void, although the same court, composed of different judges, may have upheld such legislation as constitutional. A well-known example is the income tax decision, prior to the last constitutional Amendment. *Pollock v. Farmers' Loan & T. Co.* 39 L. ed. 1108. However, our American view is well settled, after more than a hundred years of power exercised by the courts to declare laws unconstitutional. It may be noted that the popular idea is not as favorable to the courts exercising this power as it is with the lawyers, for the new Constitution of Ohio provides for almost a unanimous vote before a law may be declared unconstitutional by the supreme court, and also in the state of Minnesota, at this writing, there is a proposed amendment to be voted on, requiring five judges out of seven of their supreme court to agree upon the unconstitutionality of a law. As to which is the better procedure to determine the constitutionality of a law, has been the subject of much debate in Germany.

The Judiciary.

One thing stands out prominently in German law, that is, the independence of the judiciary. It is provided: First, "The judicial power shall be exercised only by courts;" second, "These courts shall

be subject only to the law." The uniform practice has been to leave the judiciary absolutely independent.

As the judges in Germany are invariably appointed by the respective state governments, and those of the Federal Supreme Court by the Senate, with the consent of the Emperor, it follows that the tenure of office is, as we term it, "for life or good behavior." The Empire has fixed by legislation the minimum qualification required of anyone appointed to be a judge; any state may raise these qualifications, none, however, may fall below them. Accordingly, a person who desires to pursue a judicial career will have to enter upon a tedious and arduous preparation, commencing with the public schools, then a course in the University, and after graduation there is required nine months' service in the *Amtsgericht*, one year in the *Landgericht*, four months with the state's attorney, six months with a practising attorney and notary, then again, nine months in the *Amtsgericht*, and six months in the *Oberlandesgericht*. During all these months of service, the compensation allowed is about 200 marks, or \$50 a month. The state requires two strict examinations, and if the applicant passes these examinations he may be considered on the waiting list, serving meanwhile in minor capacities, until he obtains an appointment to a judicial office. He is not entitled to an appointment to a judgeship as a matter of course; the government may ignore him entirely for years; and if he desires he may become a practising attorney, but then his opportunity for appointment to the bench will be lost.

In this way, there is no doubt that the German courts are presided over by experts, highly trained and efficient in all the technical procedure and practice of the courts, and well versed in the law from a student's standpoint. As this creates a separate body of public servants, they are as a rule jealous of their honor and position, and endeavor to render the very best service to the state and the public. But, on the other hand, such training deprives them of worldly knowledge and experience in business affairs, and to one accustomed to practising in American courts it would seem as if they

lacked adaptability, and are short on practical ideas. This point has been discussed in Germany, in that it was urged that the prospective judge should spend some time in some mercantile establishment, in a bank, or factory, or all of these, in order to broaden his ideas by actual contact with people and with practical affairs of life.

The judiciary is safeguarded in its tenure of office, for it is provided, "No judge shall, against his will, be permanently or temporarily removed from office, transferred to another place, or retired, except by a court of competent jurisdiction, and on grounds and according to the forms prescribed by law." Sec. 8, clause 1, *Gerichtsverfassungsgesetz*, the judiciary act.

By statutory provision a judge may be removed from the Imperial Supreme Court, and also the different state courts, by complaint lodged for that purpose, charging the judicial officer with either the commission of a crime or misdemeanor, when a temporary suspension may be had, or for incompetency by reason of waning mental powers, inefficiency, or neglect of duty; a hearing is then had as in the case of the *Reichsgericht*, before the full bench, excepting the one on trial, the state's attorney representing the Empire; and the decision may remove the judge from office, or reprimand him. Likewise a member of the judiciary may be retired by reason of bodily or mental infirmity, who in any way becomes incapacitated, if he does not apply for retirement; but if retired under such circumstances he is allowed a portion of his salary as a yearly pension, which rates a full term of service at fifty years; this, however, includes the years spent in preparation, and in the University, and before appointment to office. If the judicial officer has served ten years, his pension would amount to twenty sixtieths of his salary, and would increase at the rate of one sixtieth each year following, up to the end of his fiftieth year of service.

In this manner, an incompetent, inefficient, or superannuated judge may be speedily removed from office by lodging a complaint with the proper court. In this country we still pursue the archaic

method of impeachment before a political body, tedious and very expensive; of which Jefferson said: "Impeachment is scarcely a scarecrow."

The agitation in this country for recall of judges by popular vote is undoubtedly an attempt to reach similar results as are attained speedily and readily in Germany, as outlined above. It seems that the old idea of impeachment should be abandoned, and in place thereof, through constitutional amendment, a procedure provided for substantially as follows:

Any one aggrieved, to file with the governor or President charges in writing, and if deemed of sufficient gravity and importance to require an investigation, that then a temporary court be organized, consisting of four supreme court judges and four inferior court judges, the chief justice presiding, unless charges be preferred against him, and then some other judge should be appointed to preside, giving the accused judge an opportunity to appear before this body, and have a hearing according to prescribed rules. There is no doubt that such a tribunal would render exact justice in so far as the accused would be concerned, and the public, and would be highly beneficial to the public service in general. Such a court would pass sentence for removal, suspension, or reprimand, as the case might require. If such a system were adopted, in all probability the popular opposition to the appointment of judges would largely disappear, in that a judge could be speedily brought to account, and an inefficient, incompetent, or corrupt official could be readily removed.

The Bundesrat.

The fifth court is the "Bundesrat,"—Senate. It has appellate jurisdiction in refusals to grant building permits in naval ports, matters pertaining to the Imperial insurance office, to retiring and pensioning all imperial officials, etc. If a state refuses to abide by its constitutional obligations, it may be compelled to act by an "execution." The Bundesrat determines whether the state is delinquent, and how and when such execution may be issued. Article 77 of the Constitution provides: "If in any state of the

Bund (Union) a case of refusal of justice shall arise, and sufficient relief cannot be obtained by legal measures, then it shall be the duty of the Bundesrat to receive substantiated complaints respecting the denial or obstruction of justice, which shall be judged according to the Constitution and existing law of the state concerned." Article 76 regulates the settlement of disputes between different states, before the Bundesrat. In the various matters the Bundesrat acts judicially in determining the facts, and then proceeds to execute its judgment. Members of the Bundesrat receive no compensation. The Emperor has no veto power.

There are other special courts, but an extended reference to them would serve no useful purpose.

Efficiency of German System.

Another advantage is found in the German laws, in that they are coextensive with the Empire, in practice and procedure, commercial affairs, and in all matters upon which the Empire may properly legislate. If such were the case here, remedial laws throughout the United States, in the different courts of record and appeal, would be substantially alike in all of them, except as the law left minor details to court rules to suit different localities. Laws pertaining to negotiable instruments, marriage and divorce, devise and descent of property, and various other subjects of general scope and importance, could be legislated upon, so that the laws would be alike throughout our whole country, thus avoiding the spectacle of having judges in one state decide a proposition one way, and in another state the other way, making the law guess-work for business transactions, and an absurdity from a legal standpoint.

Of course no system is perfect. But it must be conceded that the Codes of Germany have been successful, for it is said in *1 Continental Legal History*, page 450: "Perhaps the highest tribute to the quality of the work (referring to the Codes adopted in 1900) may be found in the fact that in the first decade of its operation only one important provision

(Liability for Animals) has called for amendment."

Every nation, like an individual, must work out its own salvation. This country, from a mere colony, in a little over a century has attained a place among the mightiest powers of the earth. We have been successful beyond parallel in many lines of human endeavor, and I believe that the future of this Republic will be brilliant with yet far greater achievements. However, the greatness and prosperity of a country depend much upon wise and just laws, properly and impartially administered. This means that our judiciary must do its work efficiently and honorably. To accomplish this end, no doubt, judges should be assured of a secure tenure of office, with ample compensation, subject only to removal for cause. In some states we have adopted the direct primary for judges. The result is that anyone admitted to practice, without regard to competency, may file for justice of the peace, or judge of the supreme court; and if he can get enough votes, no matter how, he may be elected to the highest or lowest judicial office in the gift of the people, without regard to qualifications.

I just saw an editorial in one of the leading daily journals, commenting upon the qualifications possessed by one of the candidates for the supreme court, thus: "He is without standing at the bar of this state, or in the legal fraternity, and known chiefly in local justice courts by reason of unsatisfied petty judgments against him."

One of our prominent men of affairs is quoted with reference to the direct primary, which aptly applies to the election of judges by direct vote: "The American people have shown great aptitude and achieved phenomenal success in two distinct fields of endeavor,—baseball and business. During the prosperous years of these two great national games, rules governing the respective games were formulated by experienced parties in the two games.

"Business has suffered seriously from modern policies, and baseball will suffer equally should the same policy be adopt-

ed, of having the National Commission which determines the rules of baseball selected under a direct primary system from among those who never played the game and have seldom seen it placed."

The keynote of German success in every line of human effort has been "efficiency," but what may be suited to the German people may not be suited to our conditions. I am not urging the adoption of any foreign idea, only this,—that if there is anything good, we should adopt it, no matter where it originated. On that basis I believe that, to attain ideal results in the administration of justice, the following suggest themselves:

1. Judicial officers should be appointed, with ample compensation, subject to removal by a court as above outlined, although it may necessitate a constitutional Amendment.

2. Whenever practicable, uniform laws throughout the nation should be adopted.

3. In commercial centers, a department of court known as the commercial court should be created, for the speedy, inexpensive, and efficient adjustment of all commercial litigation, presided over by a judge and laymen having special business qualifications.

In closing I wish to say that I hope this article may be of interest to some of our profession. Many problems are before us that require much study and experience for solution; that they will be properly met and solved is beyond doubt, for the American people have been equal to every occasion. What I have offered here reminds me of the language used by one of the brightest ornaments of the legal profession, in his farewell lecture at the University of Oxford,—Sir Frederick Pollock,—"Whoever brings a fruitful idea to any branch of knowledge rends the veil that seems to sever one portion from another; his name is written in the Book among the builders of the Temple."

Fred W. Peterson

The Courts of the Republic of Panama

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The Constitution and laws of the Republic of Panama provide that the administration of justice is to be exercised by the Supreme Court of Justice, a superior court, circuit courts, municipal courts, and whatever other organization it may be necessary to create in accordance with necessity and public treaties.¹

The Supreme Court.

The Supreme Court is composed of five magistrates, who are appointed by the President of the Republic for a term of four years. Every year the court selects from its number a president and a vice president. The officers and employees of the court are a clerk, a managing clerk, a reporter, seven assistant clerks, and two messengers, all of whom are appointed and subject to removal by the court.

To be eligible for appointment to the Supreme Bench, it is necessary to be a Panamanian by birth or by adoption, having resided more than fifteen years in

the Republic, to have attained the age of thirty, and to be in full enjoyment of civil and political rights. Certain educational qualifications are prescribed as necessary. One must have the diploma of a lawyer, or have practised creditably for at least ten years the profession of law, or have been employed in the Department of Justice for the same period. A person who has been convicted of a crime is not eligible.

In framing constitutions, the Latin-American jurists foresaw the possibility of a judge being sick, absent, or temporarily disabled, and thus delaying the administration of justice, and they therefore incorporated clauses providing for deputy judges. Thus the Constitution of Panama says that five substitute magistrates shall be named for the same period as the regular magistrates of the Supreme Court, and that they are empowered to fill, in their order, any temporary vacancy made by the magistrates.

¹Article VI. of the Canal treaty, entered into between Panama and the United States in 1903, provides that all damages caused to the owners of private lands or private property of any kind, by reason of the grants contained in the treaty or by reason of the operations of the United States, its agents, or employees, or by reason of the construction, maintenance, operation, sanitation, and protection of the Canal, or of the works of sanitation and protection provided for, shall be appraised and settled by a Joint Commission appointed by the governments of the United States and the Republic of Panama, whose decisions as to such damages shall be final, and whose awards as to such damages shall be paid solely by the United States.

The requirements of this article were one of the reasons why the framers of the Constitution, which was adopted in February, 1904, and therefore subsequent to the signing of the treaty, provided that the administration of justice is also to be exercised by whatever other

organization it may be necessary to create in accordance with necessity and "public treaties."

The Constitution also provides that the judicial functions of the national assembly are: (1) To take into consideration the denunciations and complaints presented against the President of the Republic, or the person in charge of the executive power in those cases wherein they are responsible; the Secretaries of State, the Magistrates of the Supreme Court of Justice, and the Attorney General of the nation. (2) To try the President of the Republic, or the person in charge of the executive power, in accordance with the Constitution; the Secretaries of State, the Magistrates of the Supreme Court of Justice, and the Attorney General of the nation, when they are accused of executing acts, while in the discharge of their duties, against the safety of the state, against the free working of the public powers, or acts in violation of the Constitution and national laws.

In case of a permanent absence, a new appointment is at once made.

Undue influence on the part of the government is prevented by a provision compelling the resignation of a magistrate who has accepted employment from the government. And the judge is secure in his position from the same influence, by a clause providing that the magistrates and justices cannot be suspended in the discharge of their functions, except in such cases and by such formalities as are provided by law. Neither can they be deposed, except by virtue of a judicial sentence; nor can their salaries, having been fixed by law, be decreased during their term of office.

The Supreme Court has jurisdiction privately and in one instance only, of misdemeanors committed by the President of the Republic, the Secretaries of State, the Attorney General and the magistrates of the Supreme Court, who are in the exercise of their duties; of irregularities or misdemeanors committed in office by diplomatic and consular agents, the Director General of Posts, the Director General of Telegraphs, the Chief of the National Police, the Treasurer General of the Republic, the Sub-Secretaries of State, the Agent of the National Bank, the Superior Judge, circuit judges and certain other officials; of matters in dispute of diplomatic agents accredited to the government of Panama, in cases provided by international law; of actions regarding maritime navigation or navigable rivers touching the territory of the Republic and of prize cases; of controversies which may arise over contracts

or agreements celebrated by the State of Panama, when a part of Colombia, or by the national executive power with the municipalities or with individuals; of actions for setting aside judgments given in matters in which the court has jurisdiction privately in solely one instance;

of matters of appeal and of proceedings for condemnation. It has jurisdiction, in the second instance, of all cases in which the superior and circuit judges have jurisdiction in the first instance and in which there is an appeal, writ of error, or certiorari; in decisions rendered by circuit judges in matters of voluntary jurisdiction; of appeals made against the decrees issued by the Agent of the National Bank, or by tax collectors invested with coercive jurisdiction, when it refers to national revenues; and of decisions rendered by legal

arbitrators. It has power to decide in regard to legislative acts which may have been objected to by the executive power as unconstitutional; to settle questions of jurisdiction which arise between a superior and a circuit judge and between two circuit judges; to decide who has lost or regained citizenship according to the Constitution; to appoint the superior judge, those of circuits and their substitutes; to hear and pass on excuses which judicial employees, appointed by the court, may present, and to accept resignations; to grant permission to the President of the Republic to take a leave of absence, and to summon the Vice President who is to take his place, in the cases provided by the Constitution, when Congress may not be in session; to swear into



Photo by Harris & Ewing, Washington, D. C.

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office the President of the Republic, when for any reason he may not be able to take office before Congress; to approve or disapprove the assessment of costs when a party has been ordered to pay them; to fix the fees of litigants or their attorneys, and to moderate the valuations of experts when they may be excessive; to hear and pass upon claims in regard to costs, fines, and arrests which said court may impose correctionally; to punish correctionally with fines of not more than \$25 or detention for not more than six days, those who disobey its orders or who do not show proper respect in the matter in which the court is discharging its duties; to punish with fines of from 50 cents to \$2.50 the irregularities, omissions, or faults which it may observe in civil and criminal matters under its jurisdiction, committed by the inferior judges, agents of the Department of Justice, the parties, or their attorneys; and to make such report as Congress, the President, and the Attorney General may request in regard to matters under its jurisdiction; to report to Congress and the President any questions which may arise as to doubts, omissions, and inconsistencies which it may have noted in the application of the laws; to propose the changes or modifications which the laws may need in regard to civil matters and judicial procedure, presenting to Congress corresponding projects of law for said changes, signed by all of the magistrates; to make the necessary rules of the court; to set the day and hour for hearing the parties, if the matters in their judgment require it, the argument to be purely oral, and to limit in each case the time for argument, without permitting the reading of briefs; to draw the panel of jurors, with the assistance of the Attorney General, the superior court and its attorney, and to decide on the excuses which the parties may give who do not desire to serve.

The President of the Supreme Court presides at its meetings, serves as an organ of communication with the high officials of the government, with Congress, and with other employees and individuals to whom the court may wish to address itself directly. He distributes cases before the court, convenes it, maintains

order, punishes for contempt, grants leave of absence to the justices, is custodian of the archives and property, and compels the justices, under penalty of fine, to attend court and sign decisions rendered by a majority.

The Superior Court.

In the city of Panama, which is the capital of the Republic, there is a superior judge, whose jurisdiction extends over the entire Republic in criminal cases only. He has a clerk, a managing clerk, two assistant clerks, and two messengers whom he can appoint or remove as he sees fit. In order to hold office, he must be a citizen, and not related to the magistrates of the Supreme Court within the fourth degree of consanguinity or the second of affinity, versed in law, and of good reputation. The court also has an attorney who prosecutes cases before it in behalf of the government. The judge is appointed for four years, and has two substitutes, appointed for two years, who take his place during his absence, or while the position is vacant.

The superior judge has jurisdiction, with a jury, of cases of attempts at or commitment of the crimes of treason during a foreign war, homicide, arson, assault by mob, poisoning, robbery of property of the value of \$200 or more, larceny of property of the value of \$250 or more, embezzlement when the amount exceeds \$500, and false pretenses where the value of the property obtained or the money secured is \$15 or more, and other crimes mentioned in the Penal Code. But the superior judge does not have jurisdiction of such crimes when the penalty is imprisonment, detention, or other penalty not corporal, nor of crimes of robbery or larceny of one or more heads of cattle, whatever the value may be. He has jurisdiction, with a jury, of the crimes of public or private slander and injury, although the penalty may be one of those mentioned above.

The court also has jurisdiction in the first instance, without a jury, of criminal cases against the clergy, and of irregularities and misdemeanors against the following persons: Governors of provinces, attorneys of the circuit court, pos-

tal agents, inspectors of ports, provincial administrators of the treasury and of public lands, cashier of the general treasury of the Republic, and other employees.

The Circuit Courts.

The first law enacted in regard to judicial organization, Number 58 of 1904, provided for a division of the Republic into seven circuits, one in each of the seven provinces (states) of Bocas del Toro, Coclé, Colon, Chiriquí, Los Santos, Panama, and Veraguas, and that each should bear the name of the province in which it is located and over which it has jurisdiction. By law Number 45 of 1912, provision was made for an additional circuit in the Province of Los Santos, which is called the circuit of Oriente. In each judicial circuit there is one circuit judge, except in the circuits of Panama and Colon, the former having three and the latter two.

In order to be a circuit judge, one must have the same qualifications as are necessary to be a superior judge. Each judge has two substitutes who take his place when he is unable to serve.

As a general rule, the circuit judges have jurisdiction indiscriminately of civil and criminal matters, although there may be two or more in the same circuit; or the executive power can separate the civil from the criminal, and can decide how many and which judges shall have charge of each class of these matters.

The circuit judges have jurisdiction in the first instance of matters in dispute in which a municipal district may be a party, bankruptcy and insolvent proceedings, actions on accounts, over unoccupied lands, for divorce and annulment of marriage, over alimony, over mines, over emancipation of children, over qualifications of age, of injunctions, over judicial intervention in the administration of guardians and over judicial matters and disputes which are not subject to the jurisdiction of another court. They have jurisdiction, when large amounts are involved, in ordinary actions, summary proceedings, actions of succession by reason of death, of partition of property, demarcation and setting of landmarks, actions in regard to easements,

and of those suits which are brought over the nomination and removal of guardians.

They also have jurisdiction in judicial matters of voluntary jurisdiction, which have not been attributed to another authority by law, or misdemeanors that may not have been expressly attributed to another authority, actions for setting aside judgments which may be rendered in matters in which the circuit and municipal judges have jurisdiction in the first instance, and in matters of rural police in which the governors and mayors have jurisdiction in the first instance, in matters in dispute in which the nation may have a part, actions in aid of the poor, actions for robbery of one or more heads of cattle, irrespective of their value, and of suits in regard to the validity or nullity of municipal ordinances and of the acts of the municipal councils, and of licenses granted for the permanent improvement of public lands.

The circuit judges have jurisdiction, in the second instance, of matters over which the municipal judges have jurisdiction in the first instance and in which there has been an appeal, writ of error, or certiorari.

Among the other functions of the circuit judges is that of settling disputes that may arise between the municipal judges of their circuits, to give and request necessary reports for the good administration of justice and to appoint the municipal judges. In the circuits of Panama, and Colon, the appointment is made by the judges in banc. Each circuit judge has a clerk, a managing clerk, an assistant clerk, and a reporter, all of whom are named and may be removed by the judge.

The Municipal Courts.

Each of the provinces has municipal districts, in which are located the municipal courts. The number of districts varies from three to thirteen in each circuit, having been fixed according to the size of the province, its population and judicial needs.

With the exception of the cities of Panama and Colon, each city has at least one municipal judge. In Panama there are three. The city councils can increase

the number of judges when it may be necessary for the administration of justice. Each judge has a clerk and such assistants as the municipal council may give, whom he can appoint or remove freely. In order to be a municipal judge, it is necessary to be a citizen in full exercise of civil rights, and of good reputation, and not related to the circuit judge who reviews his decisions in the second instance. But in the capital and in the heads of the provinces it is necessary to be versed in the science of law. The term of the municipal judges and their substitutes is one year. If they and their substitutes are unable to perform their duties, a provisional substitute is named.

As a general rule, the municipal judges have jurisdiction indiscriminately of civil and criminal matters, although there may be two or more in the same district; but the municipal council, in agreement with the governor of a province, can separate the civil from the criminal, and determine how many and which of said judges shall be charged with each class of said matters.

The municipal judges have jurisdiction, in the first instance, of the following criminal matters. Improper extraction or opening of correspondence of individuals, revealing secrets, threats, wounds, blows, or assaults when the incapacity of the injured one does not last more than eight days, injury to property, larceny, false pretenses, and embezzlement, the amount of which is not less than \$5 nor more than \$50, public concubinage and freeing of prisoners and those under arrest.

The municipal judges also have—

1. Jurisdiction in all petty matters in dispute between individuals when the amount thereof does not exceed \$10; the parties having the right of appeal;

2. Jurisdiction in the first instance of ordinary actions, summary proceedings, succession by reason of death, of partitions of property, or demarcation and setting of landmarks, of possession, of easements, and of those cases relating to the appointment and removal of guardians where such suits may be of small amount, being \$10 or less. The municipal judges of the capital of the Republic

also have jurisdiction of such matters when the amount thereof does not exceed \$25.

3. Jurisdiction to punish correctionally with a fine of not more than \$2.50, or an arrest of not more than twenty-four hours, those who may disobey or lack in due respect.

4. All other jurisdiction which the laws may give.

Police Jurisdiction.

The crimes of larceny, false pretenses, and embezzlement, the amount of which does not exceed \$5; that of quarreling, wounds, blows, or maltreatment which does not cause the sickness or incapacity to work to last more than two days; those of injury to property of another, excepting those that may arise from fire, and those which may be punished with the penalty of imprisonment or detention, or those of violent despoliation or disturbing of possession, use of the property of another without the consent of the owner, and the changing of the boundaries of private or public land,—are under the jurisdiction of the police.

The Commission Judges.

The Supreme Court can commission the judges of the Republic, the governors, and subordinate officials, to issue or carry out any judicial requirement. When so empowered, such officials are called commission judges. Among their duties are those relating to the inventory and valuation of properties in suits of succession, and to the receivership of said properties in order to prevent any irregularity or loss; of levy, inventory, and valuation of property in suits of creditors against an insolvent debtor, and of seizing the private papers of the debtor; of making personal investigations and issuing summons for the circuit judges in the civil branch; and of summoning and taking the testimony of such witnesses whose evidence may be needed.

Every commission has to be performed within the term prescribed by law, and, when not so fixed, the judge arranges it with due regard to the nature of the matter and the distance from the court.

The Attorneys of the Courts.

Generally speaking, it is the Attorney General, who appears before the Supreme Court in all matters in which he ought to intervene. He issues the necessary instructions for the investigation of crimes, appears in suits in defense of the property or interests of the Republic, including those of the provinces and districts. The superior court also has an attorney, who is an officer of the Department of Justice, and who attends to the criminal matters before the court, and intervenes in such matters in which the government may be interested. The circuit courts and municipal courts also have their attorneys, who are officers of the Department of Justice, and who appear in behalf of the government. All criminal matters before any of said courts are presented by the attorneys of the government.

Procedure.

(a) Civil.

When one wishes to bring a civil action before a court, he files a complaint, and a summons is at once issued. Three days after service, a conference is held with the judge by the plaintiff, defendant must, within five days thereafter, file of trying to effect a settlement of the case. If they are unable to do so, an additional conference is held; and if no settlement is then arranged, the defendant must, within five days thereafter, file his answer. If the answer denies some or all the facts enumerated in the complaint, the judge issues an order fixing the time, not to exceed thirty days, to receive evidence.

At this stage of the proceedings, depositions are taken by the judge, and documentary evidence is submitted by both parties. When all the proofs have been submitted, the judge issues another written order to the effect that all the original papers, that is, everything that has been submitted by both parties and recorded, be delivered for six days, first to the plaintiff to prepare and submit his argument (brief), and then to the defendant to prepare and submit his answer. These are then filed with the judge, who renders his decision without hearing any oral arguments of the law-

yers, the latter being permitted to argue orally only before the Supreme Court in civil matters.

(b) Criminal.

When a person commits a crime, and complaint is made, supported by the evidence of a witness, he is at once arrested by a public authority, who thereafter makes an investigation, takes evidence in writing, and forwards the same, with a report, to the proper magistrate. This judge then hands the report to the prosecuting attorney of the court in order to secure his opinion as to whether or not the party should be prosecuted. If the judge finds evidence enough to indict, he issues a decree of indictment.

The defendant may have the right of appeal from the indictment, but if he does not avail himself of this privilege, he goes to trial.

As has heretofore been shown, the Supreme Court draws the panel of jurors, but it does so with the assistance of the Attorney General, the superior judge and the attorney of the superior court. A jury of three men is called from the panel, and before it the witnesses appear and testify orally, notwithstanding that their written depositions may have been taken at the time of the investigation by the arresting authority. Oral arguments are made by the lawyers. The jury renders its verdict, and, if the defendant is found guilty, the judge sentences according to the law.

Absence of Judicial Delay.

Certain laws have been enacted in Panama for the purpose of preventing judicial delay. During the last three days of each month, the Secretary of Government and Justice, accompanied by the Attorney General, visits the Supreme Court, and makes a report of the matters before it, those that have been decided by each magistrate, and the unavoidable delays, if there are any. This report is published in the Official Gazette. A similar visit is made by the same officials to the superior court. The judges of the circuit court are visited by the governor, accompanied by the attorney of the court. The mayor, accompanied by the attorney of the municipal court, visits the municipal courts. The

reports in all of these inspections are at once published in the Official Gazette, in order that the people may be informed whether the courts are promptly despatching the business before them. The President of the Republic is empowered to assess a fine of \$2.50 to \$25 on the governors and mayors who do not send monthly reports to the Secretary of Government and Justice in regard to their visits.

Every delay which judicial officers or those of the Department of Justice incur, in whatever act, action, or matter, in which they have to act, which is not properly excused, is punished with a fine equivalent to one tenth part of the monthly salary, or with one fifth part in case of repetition. The fine against the municipal judges and attorneys of the municipal courts is imposed by the mayor of the respective district, against the judges and attorneys of the circuit courts by the governor of the respective province, and against the magistrates of the

Supreme Court, the Attorney General, and the superior judge by the President of the Republic.

A careful study of the judicial organization of the Republic of Panama leads the writer to conclude that certain of its laws could well be adopted in this country. Those providing for official visits to the courts tend to stimulate the activity of the judge, and thus expedite the business before them. Those permitting the parties to appear before the judge in order to settle their controversy in an amicable manner, if possible, saves litigants the unnecessary delays and costs which are too often caused in the trial of cases, a settlement of which might easily have been arranged beforehand through the good offices of the judge.

Walter S. Penfield

Calm Before the Storm

Waiting for the judge to come
Lawyers oft are found
Chatting some and joking some
Pleasantly profound.

Wit and Wisdom here unite
Hearts are light and warm.
Tis a time of calm delight
Just before a storm.

What a pleasant hour is this
When the lawyers meet
All prepared for business
Victory or defeat.

Now the crier calls, "Arise,
Stand ye gentlemen!"
And his honor blandly wise
Opens court again.

Soon the wordy wars begin
Calm no longer lasts
Each contending hard to win
Soon forgets the past.

All the day their work proceeds
Suits are lost and won
Suitors get their ample needs
Ample justice done.

W. D. TOTTEN

Spanish Courts: Some Points of Interest

BY THOMAS W. PALMER, JR.

of the Birmingham (Ala.) Bar



A COMPARATIVE view of the Spanish courts may offer helpful suggestions to our lawmakers who are striving to correct the evils which are creating, in some sections of the United States, a popular distrust of our judicial bodies. But aside from this, a knowledge of or acquaintance with the various departments of the legal system of Spain presents a greater practical value. Like England in her conquests in the New World, Spain has carried her civilization and laws to Central and South America. The law, both adjective and positive, of Latin-America, bears a close similarity to, and is at times identical with, its parent. Cuba, Porto Rico, and the Philippine Islands were governed practically by the same codes as Spain upon our acquisition. In the first-named country but few changes have since been made.

The Spanish judicial system offers today a reasonably effective machinery for the administration of justice. The present system, developed from a Roman origin, has been shaped under some powerful modern influences, especially that of France. It is interesting to note that the common law of England contributed the ancestry of the existing form (though not the origin) of the Spanish jury. There are, of course, necessarily many points of similarity in all systems, both of common and civil law countries. For this reason, and also as the topic undertaken in this article is so broad, only a few leading peculiarities will be pointed out.

The Peninsula and the Balearic and Canary Islands are divided geographically for the administration of justice into districts (*distritos*) which are sub-

divided into *partidos*, *circunscripciones*, and *terminos municipales*. In the municipal *termino* are one or more courts (*juzgados municipales*) possessing our justice of the peace jurisdiction over misdemeanors and civil suits involving small amounts. The courts of the *circunscripciones* (*juzgados de instrucción*) are really tribunals of accusation, with a function similar to that of our grand jury. The *partido* has trial courts for civil matters (*juzgados de la instancia*). In each *distrito* are appellate courts (*audiencias territoriales*) for civil matters, and one or more *audiencias provinciales* on the criminal side. The Supreme Court (*Tribunal Supremo*), or the court of last resort for the entire monarchy, is situated at the capital, Madrid.

Specialization by judges in civil or criminal law is required by a complete separation of the courts, even inclusive of the Supreme Court, which is divided into civil and criminal sections or *salas*.

Civil Jurisdiction.

The jury is not used in civil trials, the court of the first instance consisting of one who decides the facts and applies the law. Appeal is made from his decisions to the *audiencia territorial*, composed of three judges, and situated in the largest central city of the district. The appeal from this court to the Supreme Court is considerably limited.

The most unique and interesting institution for the settlement of civil suits is the arbitration court. All contentions or disputes before or after the commencement of litigation, no matter how far advanced, can be submitted to an arbitration tribunal by agreement of all the interested parties. The exceptions to this are those suits involving political and civil rights, etc., or those matters in which the state is especially concerned. The arbitrators, whose number must not

exceed five, are lawyers of twenty-five or more years of age and in full enjoyment of civil rights. In some instances the arbitrators may be laymen (*amigables componedores*). Appeal is made from the arbitration direct to the territorial appeal court. This method of deciding claims has proven successful, and is employed considerably. Chancery courts and equity jurisdiction are inconceivable and foreign to the Spanish lawyer. Even the professors who teach comparative law have at times strange ideas of this strictly common-law institution. Civil procedure in Spain is divided into two general heads,—contentious and noncontentious or voluntary jurisdiction, names which sufficiently describe the scope of each. Special courts to try commercial matters were established in Spain in 1831, but the results expected were not forthcoming, and many abuses were committed under their rule. They were accordingly abolished in 1868. Their re-establishment is a live question at present although the jurist Lorenzo Benito has asserted that the agitation in their favor is merely a protest against the defects in the administration of justice, which are felt more quickly when they affect mercantile interests.

The notary public, while not a judicial officer, is interesting from a procedural viewpoint. He is of far more importance in Spain than the similar official of Anglo-American law. A long preliminary training, with a thorough examination by the state, is required. As public officials they are not permitted to hold

other governmental positions, and, as the lawyers, are under the supervision of an Association of Notaries (*Colegio de Notarios*). They execute and certify all written contracts and other extrajudicial instruments, and protest negotiable paper. Under the law, practically all

deeds, contracts, and agreements of importance must be certified by a notary public. Their records are extremely important. On the criminal side the *audiencia provincial* is really the court of the first instance for felonies or *delitos*, while the *juzgados de instrucción* only holds the preliminary hearing or *sumario* and draws up the indictment. Each province has an *audiencia*, which term literally means an appeal court. Under the ancient codes (*Fuero Juzgo*, *Fuero Real*, *Siete Partidas*, and the *Novísima Recop-*

ilación) and up to modern times, the inquisitory system in criminal prosecutions prevailed. Secret trials and tortures were employed to produce the truth. In accordance with enlightenment of the nineteenth century, the courts and their procedure, however, have undergone important changes through the adoption of the accusatory system.

The statutory division of crimes into *delitos* and *faltos* (somewhat analogous to our felonies and misdemeanors) determines the initiatory proceedings following the commitment of a crime. All misdemeanors are tried publicly in municipal courts.

In cases of felonies the institution, the *sumario* (preparation for the trial), is employed. The *juzgado de instrucción*



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in the *sumario* is in fact but performing the duties of our grand jury, but the outrages and atrocities committed under its name in some instances in the New World have brought upon its function much unjust criticism. Following the commitment of a crime the *sumario* or investigation for indictment is begun by information or accusation to certain officials. It is interesting to note that the accusation of a wife, husband, parent, grandparent, child, or grandchild is insufficient to set in motion the proceedings of the *juzgado de instrucción*. The prisoner, although placed in confinement, can consult a lawyer. The judge and the solicitor conduct an impartial investigation to discover if the charges preferred are based on good evidence and are not frivolous. The preliminary hearings are secret, but the judge is bound by rules of evidence to some extent. The Spanish Constitution (arts. 4, 5) prohibits the detention of accused persons except for just causes. The proceedings based on this provision are the nearest approach in Spanish law to our *habeas corpus*.

As has been stated, the real court of the first instance is the *audiencia provincial*. This court, composed of three judges, is styled the "jury court," because here only is employed that institution so familiar with us. A form of the jury trial, whose origin in general is usually credited to England, was known and provided for in Spain as far back as in the *Fuero Juzgo* (Leyes 13 & 16, Book II. Title 1), and in some of the provincial or *foral* laws of the thirteenth century. However, the present form is clearly of English ancestry.

The efficacy of the jury in Spain has been and is to-day the object of spirited discussions. The main argument of its defenders is that it safeguards individual liberty. The modern jury was first employed in 1820, in trial of charges preferred against the press. A somewhat broader scope was later given it, but in 1875 the entire institution was suppressed. The act of April 20, 1888, re-established a modified form with jurisdiction to sit in trials of felonies. It was never extended to Cuba, Porto Rico, or

the Philippines by the Spanish government.

The function of the Spanish jury is similar to ours,—to render a verdict of guilty or not guilty upon the facts. The organization comprises twelve men and two substitutes (*suplentes*). The service is obligatory upon all Spanish citizens of the secular state, with some exceptions, but the personal requirements are fairly strict. To be eligible as a jurymen one must be a Spaniard above thirty years of age, in full enjoyment of civil and political rights, know how to read and write, be the head of a family (or possess a professional or academic title), etc. Appeals from these trials are of four classes: To set aside the verdict of the jury because of irregularities in forming the jury; to revise verdict by a new jury for "manifest errors;" appeal for violation of some statutory act or rule of evidence; and finally an appeal from the ruling of court on the law. See Jury Law. arts. 107-122.

Military Courts.

The military and naval courts have a much broader jurisdiction than similar courts in the United States. In addition to jurisdiction over persons actually in the service, they can try civilians in certain cases; as, for example, for minor offenses involving property belonging to the War Department. These courts are governed by lengthy codes. The Supreme Court or Council (*Consejo Supremo de Guerra y Marina*), a comparatively modern institution, was established in 1890.

Contentious-Administrative Courts.

When private rights are violated by official acts of the administrative and executive departments of the government, pecuniary remuneration can be sought in the so-called contentious-administrative courts. One trial court, or court of the first instance, with this jurisdiction, exists in each province; and appeal lies directly to the Supreme Court at Madrid. The amount of litigation in these courts is unusually large. Its functions, among others, include those of the Court of Claims of the United States.

The Supreme Court.

The Supreme Court (Tribunal Supremo) of the Spanish Monarchy is particularly interesting because it is one of the results of the change to a constitutional form of government by Spain at the beginning of the nineteenth century. The present court, an indirect successor of the Consejo Real de Castilla, was created by the Cortes of Cadiz by a provision in the Constitution of 1812, though it was not firmly established until 1834. Since the latter date it has been in continuous activity.

The organization is different from that of the Supreme Court of the United States. It is divided into three salas or chambers of justice for appeals in civil law, criminal law, and thirdly for appeals from the contentious-administrative courts. There is a president of the entire court, and he and the president of each sala with the fiscal or state's attorney of the Supreme Court, constitute a sala de Gobierno to render advice to executive and administrative departments, to appoint judges in certain lower courts, and to perform other duties, as, drawing up rules of order in the Supreme Court. The personnel of the entire court numbers thirty-two justices and officers. Each of the three salas has as many judges as our entire supreme court.

Court Reports.

The reports of the decisions of the Supreme Court are the only ones published and that constitute the body of law denominated *jurisprudencia* in Spain. (By way of explanation it may be said that the term "*jurisprudencia*" is also used to express the meaning of "science of law," a term better known to the Anglo-American lawyer, although it more commonly denominates judicial decisions collectively).

Judicial decisions are not binding precedents, but they possess great persuasive force. They were a direct source of law, however, until the promulgation of the present Civil Code. Article 6 at § 2, in summing up the recognized sources of law, intentionally omits judicial decisions. In default of express legislation, first, local customs,

and then general principles of law, govern. In spite of this, the change from a direct to an indirect source of law has had little practical effect on the influence of judicial precedents upon the court.

Appointment of Judges.

Spain has never had popular election of judges by the people. Even the most radical of the Republicans, in their demands for changes in all branches of the government, cannot conceive of the advisability of this distinctly North American innovation. Examinations are held for all aspirants to the bench of the trial courts. Certain members of the Supreme Court, law professors, and others, comprise the examining board for this purpose. Many preliminary qualifications and some experience are required before appointments or elevations are made to the appeal courts. Elaborate provisions are laid down as to conduct of judges in private as well as official undertakings. An interesting point is the respect and position accorded to the professors in the state law schools. They are eligible *per se* for appointments to the appellate bench, and are held in much higher esteem among the profession than with us.

The great criticism aimed at the Spanish courts is that the fees are too high, and thus litigation is too expensive. Also the national trait or habit of "*mañana*" is at times reflected in the trial of cases. Too much delay and waste of time often occur.

While there may be weak points in the judiciary of Spain, yet her courts and judges command the respect and high esteem of the people. No general unrest or dissatisfaction has demanded a change to the direct election of judges. The courts have always been impartial and fearless, either of unjust demands of monarchs or clamorous appeals of the people. They are particularly free from that duty of courting popular favor so prevalent in many of our states where judgeships depend upon the wavering tide of popularity among the masses.

W. Palmer J.

The Central American Court of Justice

A Remarkable International Tribunal

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THE most notable tribunal — in idealism and in potential practicality — ever instituted among men, is the Central American Court of Justice, established in Cartago, Costa Rica, under the treaty of Washington

of 1907. Having in mind the triumphant reality of the Supreme Court of the United States, and the embryonic (and now seemingly aborted) Permanent Court of Arbitral Justice of The Hague, this may seem an exaggerated estimate of this new international tribunal. But the American Supreme Court is an interstate court of an "indissoluble union" of states into one national government, and The Hague tribunal is neither a court nor permanent; while the jurisdiction of both is far more restricted than is that of the Central American court. The latter, too, owes its origin to the consummate genius of the American Secretary of State, Elihu Root, who inspired it with the lofty conception of a true international court which he sought in his instructions to the American delegates to the Second Hague Conference, to have impressed upon its proposed tribunal: "It should be your effort to bring about a development of the Hague tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else; . . . and who will devote their entire time to the trial and decision

of international causes by judicial methods and under a sense of judicial responsibility." This is the judicial ideal realized in the constitution of the Central American Court of Justice, the essential features of which, and of its far-reaching jurisdiction, as traced in these pages, must vindicate the high hopes entertained for this unique international court.

It may serve a useful purpose to take a brief historical retrospect of the five Republics of Central America, which have established this truly remarkable tribunal for the judicial settlement of international disputes, thus affording a readier appreciation of the influences and ideals which led to the establishment of the court, and of the social and political conditions under which its jurisdiction is to be exercised.

From the time of its discovery by Columbus, in 1502, the region known as Central America remained for over three centuries a Spanish Crown colony, under the name of Guatemala. It ranked as a captaincy-general, under the sway of a military governor, and was divided into five intendencies, with the names of Guatemala, San Salvador, Nicaragua, Honduras, and Costa Rica, and all having the same areas as the present five Republics of like names. It may be remarked, in passing, that Panama was a separate government, dependent upon the viceroyalty of Perú. Guatemala took no part in the revolution of the Spanish colonies for independence, and did not declare itself independ-

ent until 1821. It was then temporarily incorporated with the Mexican Empire of Iturbide during 1822; but upon the proclamation of the Mexican Republic, in July, 1823, it resumed its autonomy. The five former intendencies organized as separate states under their old names, but soon attempted union under a federal constitution. The experiment was short-lived and broke all world records for revolution, there having been 390-odd revolutions and violent changes of government in the union and its several constituent states in the sixteen years of its troublous existence, until 1839.

Ever since that date, many efforts have been made to renew the federal system and to establish one stable and respectable government; but reckless political ambitions, and the want of good traditions of government, and the general ineptitude of the populations for self-government, have caused the failure of them all; every treaty looking to the union of all or of several of the discordant states came to naught.

A better era dawned in 1906, when under the auspices of the United States and Mexico the "treaty of the Marble-head" was signed on that United States man-of-war by the representatives of Guatemala, Salvador, and Honduras, by which these warring Republics pledged themselves to enter into permanent treaty relations of peace, friendship, and commerce. The three governments met, through their plenipotentiaries, at the capital of Costa Rica, and on September 25, 1906, the treaty of San José was signed by the representatives of the four Republics named, Nicaragua refusing to join. This treaty provided principally for the arbitration of all disputes between any of the parties, by the Presidents of the United States and Mexico; it contained also provisions looking towards a re-establishment of the Central American Union. Wars and revolutions, again flagrant, destroyed this promising project, and to such an extent was the peace of that fair portion of the world menaced that the United States and Mexico were again forced to offer their friendly mediation. This offer was accepted by the five Central American States, whose ministers at Washington,

on September 17, 1907, signed before the representatives of the United States and Mexico a protocol providing for a general peace conference of the five Republics, to be held in Washington, for the "lofty purpose," as it expressed, "of bringing about permanent peace in those countries."

This Central American Peace Conference met on November 14, 1907, in the beautiful palace of the Pan-American Union in Washington, under the temporary presidency of Secretary of State Root. For nearly six weeks its members worked with patriotic zeal for the accomplishment of their high purposes, and on December 20 all the plenipotentiaries signed a series of seven treaties, which are in the highest degree interesting and important, and all which were promptly ratified by the five Republics.

The first of the series is the "General Treaty of Peace and Friendship," the first article of which expresses the keynote of those which follow, declaring, in the most sweeping language ever used in a treaty: "The Republics of Central America consider the maintenance of peace as the primordial of their duties; and they obligate themselves to observe always the most complete harmony, and to decide every difference or difficulty which may arise amongst them, of what nature soever it may be, by means of the Central American Court of Justice, created by the Convention which they have concluded for that purpose on this date."

I will digress to add that a codicil to this treaty contains this striking declaration, which should be more widely known: "The Governments of the High Contracting Parties will not recognize any government which may come into power in any of the five Republics in consequence of a *coup d' état* or of a revolution against the recognized government, until the representatives of the people, freely elected, shall have reorganized the country in constitutional form." This is the expression of a distinctively Latin American doctrine, dating from the Panamá Congress of 1826, and often reiterated in their treaties; it is quoted here as a controlling precedent for the action of President Wilson in re-

fusing to recognize the bloody *régime* of Huerta in Mexico, following the murder of President Madero.

The Convention for the Establishment of a Central American Court of Justice recites in its preamble that the governments of the named Republics, "for the purpose of maintaining inalterable peace and harmony in their relations, without in any case being obliged to have recourse to the employment of force," conclude a Convention for "the constitution of a Court of Justice charged with realizing such high aims." In its first article the parties agree to constitute and maintain a permanent tribunal, "to which they bind themselves to submit all controversies or questions which may arise among them, of whatsoever nature or origin they may be, in the event that their respective chancelleries have not been able to reach an agreement." There is here no reservation of "questions of national honor or vital interests," as is the vogue in so many treaties of arbitration; every question between honorable nations is submitted to the judicial settlement of a court of justice in the same way that law-abiding citizens have recourse to the courts, instead of to the *code duello* or the street fight to settle their questions of personal honor or vital interest.

The jurisdiction of the court is further defined with the amplest latitude of power of *oyer* and *terminer*, in articles II. to IV. in terms which I epitomize slightly from the Spanish text as follows:

"This Court shall likewise have juris-

diction: Of questions which individuals of one Central American country may raise against any of the other contracting Governments, on account of the violation of treaties or conventions, and in other cases of an international character, whether their own Government supports

such claim or not, provided that the remedies which the laws of the respective country afford against such violation shall have been exhausted or a denial of justice be shown. Also of all cases which the contracting Governments by mutual consent may submit to it, whether arising between two or more of them or between any of said Governments and individuals, as well as of cases arising between any of said Governments and individuals when they mutually consent to submit such question to the Court. Also of international ques-

tions which by special agreement may be submitted to it by any of the Central American Governments and that of a foreign nation. Also of conflicts which may arise between the Legislative, Executive and Judicial Powers, and when the judicial decisions or the resolutions of the National Congress shall not be respected."

The court is to have its seat at Cartago, Costa Rica, where the munificence of Mr. Carnegie erected a handsome Palace of Justice for its use, which has since been destroyed by an earthquake. The court is composed of five judges, one appointed by each Republic, "and selected from among the jurists who possess the qualifications which the laws of each country prescribe for the exercise of



JOSEPH WHELESS

high judicial office, and who enjoy the highest consideration both because of their moral character and their professional ability." Two substitute judges, having like qualifications, are to be appointed also by each country, from among whom vacancies are to be filled. The attendance of all five judges is requisite to make a legal quorum in the decisions of the court. The judges and substitutes are appointed by the legislative power of each country for the term of five years, and may be re-elected; their salaries and the expenses of the court are paid equally by all the countries. The judges enjoy the privileges and immunities granted to the highest magistrates, and in the other contracting countries, have those of diplomatic agents. The judges during their term cannot hold any other office or engage in the practice of their profession. At the beginning of each annual session, the court will elect a president and vice-president, appoint a secretary, treasurer, and other necessary officers, and draw up an estimate of its expenses.

Article XIII. declares: "The Central American Court of Justice represents the national conscience of Central America, wherefore the Justices who compose the Tribunal cannot be considered barred from the exercise of their functions because of any interest which the Republics, to which they owe their appointment, may have in any case or question."

In bringing any case within the jurisdiction of the court, the interested party shall present a complaint called "*libelo de demanda*," which shall comprise all the points of fact and of law relative to the matter, and all pertinent evidence. The court shall promptly communicate a copy of the complaint to the governments or individuals interested, inviting them to furnish their allegations and evidence within a term to be designated, which is not to exceed sixty days counted from the date of notification of the complaint. If the complaint is not answered within this term, the court shall require the defendant or defendants to answer within a further term not to exceed twenty days, at the expiration of which the court may proceed upon the evidence presented and

such as it may *ex officio* obtain, to render final judgment.

If the defendant government or individual shall duly appear before the court and present its defense and evidence, the court, without further procedure, shall decide the matter within the next thirty days; but if further time is requested to present proofs, the court may or may not grant a reasonable time therefor, at the expiration of which term the court will pronounce final judgment within thirty days. All parties in interest may be represented by counsel, who may conduct the case in accordance with the rules established by the court.

The court has power to make such orders as may preserve all matters *in statu quo* pending a final decision. For the execution of its process and orders, the court may have recourse, through the Ministry of Foreign Relations or the Secretary of the Supreme Court of the respective country, to the government or courts of any of the contracting countries, according to the nature of the act to be executed. It may also appoint Special commissioners to carry out such steps as it may order, for which purpose it may ask the assistance of the government where such proceeding is to be had. It is stipulated that "the contracting governments bind themselves to obey and to enforce the orders of the court, furnishing all the assistance that may be necessary for their best and most expeditious execution."

In deciding matters of fact presented before it, the court shall adjudge according to its free discretion, and, with respect to matters of law, shall adjudge according to the principles of international law; the final judgment must dispose of every litigated point. All interlocutory and final judgments must be rendered by the concurrence of at least three of the judges; substitute judges, in case of disagreement, being called by lot, until three uniform votes are obtained. The decisions must be in writing and contain a statement of the reasons upon which they are based; they must be signed by all the judges and countersigned by the secretary. The judgments of the court must be communicated to the five governments, and after such notification are

inalterable, except that the court, at the request of any of the parties, may declare the interpretation which must be given to its judgments. Article XXV. of the treaty contains the formal stipulation: "The interested parties solemnly bind themselves to submit to said judgments, and all agree to lend all moral support that may be necessary in order that they may be duly complied with, thereby constituting a real and positive guarantee of respect for this Convention and for the Central American Court of Justice."

The court is empowered to make its rules of organization, to formulate the rules of procedure which may be necessary, and to determine the forms and terms not prescribed in the Convention. In compliance with this provision, the court, which was immediately organized by the appointment of judges of unexceptional ability and integrity, adopted its "Reglamento" or rules of internal organization, and its "Ordinance of Procedure." The former concerns the character and organization of the court, its jurisdiction and powers, the regulations concerning the judges and officials of the court, and the "*modus operandi*" of the court. All these are merely complimentary of the provisions of the Convention, or matters of internal routine, and need not be stated. I will quote, however, the declaration contained in article I., in which the judges thus express their formal estimate of the court and its functions: "The object of the Central American Court of Justice is to guarantee with its authority, based upon the honor of the States, and within the limits of the powers which have been granted to it, the rights of each of them in their reciprocal relations, and to maintain peace and harmony among them. It is, by its nature, by its attributions, and by the character of its jurisdiction, a Permanent Court of International Justice, with power to adjudge and decide, upon petition, all the cases included in its constitutive law."

The "Ordenanza de Procedimiento" consists of 86 articles, providing under detailed chapters, rules for the exercise of actions, challenges and excuses of judges, "judicial resolutions" (which are divided into orders, decrees, and judg-

ments), notices, evidence, and "proceedings of the case." With respect to evidence, it is provided, in conformity with the treaty, that "the plaintiff shall present, together with the libel that initiates the action, the evidence upon which he shall base his claim, and the defendant shall do the same upon answering the declaration; no other evidence or offer thereof is admissible, in the course of the controversy, unless the parties should request and obtain a special leave to introduce or offer the same." The petition for leave to introduce such additional evidence must be very circumstantial as to the reasons for omitting the desired evidence at the time of filing the pleadings, and as to the nature and object of the additional evidence. Every such petition must be decided in ten days, and, if granted, a term of not exceeding sixty days may be allowed, which cannot be extended, "and evidence not introduced during the said term shall be deemed as abandoned."

Chapter VII. of the Ordenanza is entitled "of the proceedings of the Court," and may be briefly abstracted, as it treats of the substantial practice of the court, and shows the very commendable despatch of justice in this model tribunal. Upon the institution of the suit, notice runs to the defendant, which is "invited" to answer within thirty days, if it is the government wherein the court sits, or within sixty days if one of the other governments. Dilatory pleas by the defendant can only be filed during the first half of the term for answering, and must be decided within the remaining half; and such plea, presented after time stated, will be reserved until the final decision. If the dilatory plea is sustained, the irregularity or defect upon which it is based may be cured by amendment or otherwise, whereupon the action will proceed. If no answer is filed within the time of the first notice, a second citation may be made requiring answer in twenty days, in default of which answer the court will proceed to render judgment *ex parte* within the next thirty days. A decree is issued setting the case for argument on a day within the first ten days of the term for decision, and the parties may argue the case orally or submit writ-

ten arguments. The voting on a decision shall be made in accordance with an interrogatory (*cuestionario*), which shall recite all the points of fact and law at issue, as the same appear from the record, which *cuestionario* must be formulated by the presiding judge, and submitted to the tribunal for the vote of all the judges.

The formal inauguration of the court took place on May 15, 1908, amid much ceremony befitting so notable an occasion, in the handsome building erected at Cartago. Hardly had the court been installed, before it became possessed of its first case, and for the first time in the world's history was the solemn spectacle presented of a court of justice sitting in judgment between nations, parties litigant before it. This first case is remarkable in several respects, beginning with the unique fact that the court itself by telegraph, on July 8, invited the parties to invoke its jurisdiction, instead of prosecuting a war that had broken out between several of the Republics just pledged to unalterable peace and friendship. Another remarkable feature is that, in response to the telegraphic invitation, formal complaints were promptly lodged with the court by the government of Honduras against El Salvador and Guatemala; these complaints, together with all the pleadings and orders in the cause, were transmitted by telegraph,—indeed an innovation in court procedure. The record in this *cause célèbre* is 183 pages of opinion of the court, which recites *in extenso* the pleadings, documentary, and oral evidence, the *considerandos* and judgment of the court. From all this a brief abstract of the allegations, and the final sentence, are as follows:

The complaint of Honduras charged the governments of El Salvador and Guatemala with having "protected and fomented the revolutionary movement which is now astir against the constituted authorities of Honduras," and with having "violated the neutrality which they ought to have observed in accordance with article 2 of the treaty of Washington," and it charged upon "the governments of El Salvador and Guatemala the responsibility for the damage to lives and property resulting from the present

armed conflict, for the unwarranted scandal it will cause before other nations, and for the breach of public faith and of the promise given to the United States and Mexico at the Washington Conference;" it made tender of "sufficient evidence to prove the guilt of the governments which it accuses;" and, finally, prayed that the court "determine at once the status in which the governments of El Salvador and Guatemala are to remain, in order to prevent greater mischief, until the court pronounces the sentence condemning these governments, as is due."

The court at once, on July 13, 1908, made an interlocutory order, in the nature of a writ of injunction, prohibitory and mandatory, in which, "in order to fix the status in which the high interested parties are to remain pending the final decision of the case," it ordered and adjudged the following remarkable dispositions:

"The governments of El Salvador and Guatemala must (a) refrain from any military measure or movement, naval or land, and from all acts, of whatsoever nature, which might directly or indirectly imply interference in the Republic of Honduras; (b) confine in one place all emigrants suspected of being interested in the Honduran revolution or of being hostile towards the Honduran government; (c) prevent preparations from being made, or any kind of requisites intended to help or foment the conflict, within their territories; (d) rigorously prosecute any person who abets the struggle in any manner; (e) disarm and confine in one place any revolutionary force entering their territory; (f) discharge any Central American emigrants holding positions as officers in their service, and compel them to reside in their respective capitals, subject to strict vigilance; (g) reduce their military forces to the proportion necessary for their ordinary service, plus the detachments required at suitable places along the frontiers for the purpose of preventing assistance being offered the revolutionists in the shape of men, war stores, or subsistence supplies. On its part, the Honduran government shall refrain from any act of hostility against the aforemen-

tioned Republics." Signed by all the judges and countersigned by the secretary of the court.

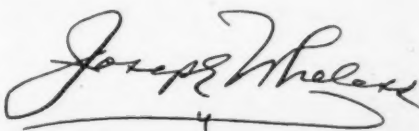
Mirabile dictu! The simple decree of a court stopped the war, the sovereign defendants submitted to judicial writs, the revolution in Honduras collapsed! Law had triumphed over arms, and an order of court over a Latin-American revolution.

All the parties readily accepted the judicial decision; a *casus belli* thus became a *res judicata*. My friend, Dr. James Brown Scott, president of the American Society of International Law, and editor of its quarterly journal, commenting on this decision, aptly says: "The decision marks a great progress towards the judicial settlement of international disputes, and shows the complete analogy between public and private law."

Following shortly upon the notable success of this first case, an eruption of nature destroyed the Temple of Justice which housed the court, and political eruptions in the several Republics practically destroyed the court itself for several years. But happily it has been rehabilitated, and has resumed its destined activities. The latest case before the reconstituted tribunal, that of *Bermúdez v. Costa Rica*, is in itself interesting, and has an added interest because it grew out of the intervention of the United States in a Central American revolution. American marines were landed in Nicaragua in September, 1912, to restore order; *Bermúdez* was a Honduran political refugee living in Costa Rica; he and other Nicaraguan refugees organized an expedition in Costa Rica to go into Nicaragua and fight the Yankees; the expedition of their vessel, the *Ultramar*, failed. *Bermúdez* sought to return to his asylum in Costa Rica, but was refused admittance by order of the President of Costa Rica. Thereupon he brought suit against the Republic of Costa Rica, before the Central American Court of Justice, claiming the right to return to the country in accordance with the provisions of the treaty of Washington. The record of the case, which was filed in December, 1913, is replete with legal questions of great interest, which are treated with

marked ability in the briefs of counsel and in the opinion of the court, but cannot be here reviewed. On April 7, 1914, the court, by a vote of three to two, decided that the order of the President of Costa Rica refusing admittance into the country to the plaintiff was lawful, and that the treaty of Washington did not establish the complete equality, or political identity, of the citizens of one country of Central America in each of the other Republics, as claimed by plaintiff. This decision, rendered within four months after suit filed, is another striking example of expedition in the administration of justice, which should shame the courts of the United States, where the "law's delays" are notorious.

Before closing this study of the truly remarkable tribunal of Central America, I cannot forbear to add a plea for its greater usefulness by extending its jurisdiction through the adhesion of the other Republics of America, thus transforming it into a real Pan-American tribunal for the adjudication of all questions and controversies among the nations of the New World. A greater and nobler temple, erected at Colón or Panamá, on the line of what President Wilson happily terms "the new center of gravity of the world," and which brings the three Americas close together at a common center of material interest and spiritual unity, would be the noblest monument to America's colossal mechanical achievement. The Panama Canal, open to the peaceful traffic of the world, and the Pan-American Court, dedicated to peace through justice in all America, would be the most ennobling inspiration to the coming ages, and America's enduring contribution to the welfare of the world and *ad maiorem Dei Gloriam*. Over the portals of this temple should be sculptured the golden words of Secretary Bryan, addressed to the assembled nations of America: "God has made us neighbors; let justice make us friends."



4

The Supreme Court of France

(La Cour de Cassation)

BY CHRISTIAN BONNET

of St. Louis, Missouri,
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IN THE early period of the French Revolution, the law of December 1st, 1790, created the Supreme Court of France under the name of "Tribunal de Cassation." The Supreme Court of the United States is about one year older, having been organized by the judiciary act of September 24, 1789, although it was established by article III, § 1, of the Constitution.

The Supreme Court of France is commonly known as "Cour de Cassation," Court of Cassation (from "casser," break, our law-term "quash" being also derived from "casser"), because it was created with the power to reverse the decisions of the lower courts. It is also designated as "Cour Suprême," or "Cour régulatrice," because it is the highest judicial court, and its decisions have so much weight that they regulate the trend of the decisions of the other courts.

Royal Parliaments Predecessors of the Supreme Court.

Before the creation of the Court of Cassation, the Royal Parliaments were at the head of the judicial power of France. We want to say a few words about those Parliaments, in order to make clearer what will be explained concerning the court. Under the old *regime*, the highest degree of jurisdiction was the Parliaments. They were thirteen in number, among which the Parliament of Paris was the most important. They were judicial courts of last resort, having considerable powers. For instance, when a controverted point, or a doubtful question, or a point not regulated by the law, was brought before them, they took the habit, which was never contested, to render certain decisions of extreme importance applicable to everybody, every-

where, in all similar cases. The courts below were compelled to take cognizance of them and to apply them, and the Parliaments themselves were bound by them until they deemed necessary to annul them. Those decisions, called "arrêts de règlement" had the force of a law, being compulsory within the jurisdiction of the Parliament until abrogated; whereby it can be seen that the Parliaments played the part of the lawmaker. This was a serious inconvenience. The arrêts de règlement of the different Parliaments were far from being in harmony, making the law most uncertain all over France.

The French Revolution abolished the Parliaments, September 17, 1790. It was the purpose of the lawgiver at this time to do away with the dangerous system of the arrêts de règlement, and to bring about uniformity in the jurisprudence of the courts by establishing a "Tribunal de Cassation" for all France. Shortly before, a law of 16-24 August, 1790, had prohibited the exercise of the legislative power, directly or indirectly, by the courts, under penalty of forfeiture, and also prohibited the handing down of decisions in the nature of arrêts de règlement.

The Supreme Court of the United States exercises a power, which, we think, is unique in the world, to pass upon the constitutionality of the statutes enacted by Congress. It may thus suspend the execution of the resolutions lawfully adopted by both Houses.

The French courts have the right to interpret the law. They cannot refuse to do so under pretext that the law is not clear, or that it is silent or insufficient. By so doing, the judge becomes guilty of a misdemeanor called "denial of justice," and he is punished by a fine, and deprived of all civil rights for a period varying from five to twenty years. But no court in France, not even the Court of Cassation, has the power to

decide whether a law passed by Congress is unconstitutional or not.

This difference must be attributed to the desire of the lawmaker to put an end to an excess of power frequently committed in the past by the Parliaments, when they vetoed the laws made by the Kings, and suspended their effect. This was the cause of sharp conflicts, in which the Kings had the last word by forcing the Parliaments to yield, obtaining by violence what could not be had otherwise.

Thus we see that the Court of Cassation was created after the Parliaments had been abolished as courts of last resort, and with the purpose to bring harmony out of chaos, and unity in the decisions of the courts throughout France, as the Code Napoleon, later, was to bring unity of legislation throughout France.

The law of 1790 did not attain this end. It vested the court with the power to reverse the decisions of the lower courts, but the court, as will be explained later, could not evoke the case, and had to send it back for a new trial to another court of the same rank as the one having rendered the decision appealed from. That second court, and even a third one, was not compelled to adopt the view expressed by the Court of Cassation in the case under consideration. They could abide by a doctrine in absolute opposition to that of the higher court. It can be understood that under this legislation the Court of Cassation was playing a rôle little in accordance with its high rank, and that it was far from being supreme. When such a conflict arose between the Court of Cassation and several other courts, the only remedy was a recourse to the legislative power by means of a petition. This system delayed the administration of justice, and it had the serious defect of allowing the legislative power to encroach, in its turn, on the attributes of the judiciary, by calling upon it to interpret the law. This was the theory of the Roman law, *Ejus est interpretari legem cujus est condere*. But the modern view is against this principle, and we believe in the separation of the legislative, executive, and judicial powers.

Innovation Brought by the Law of 1837.

A modification in the law was necessary in order to give the court sufficient authority over the inferior courts. The law of April 1st, 1837, brought the needed remedy. It provides that when, after the reversal of a first decision of last resort, a second decision in the same case between the same parties shall be appealed from on the same grounds as before, the Court of Cassation shall render a decision *in banc*. If the second decision be reversed for the same reasons as in the first case, the court to which the cause is remanded shall judge in conformity with the view expressed by the Court of Cassation on the point of law. The court, having the power to impose its view, became truly a Supreme Court, not merely a Tribunal of Cassation as before.

The Court of Cassation is composed of forty-nine judges apportioned in three divisions or chambers:

The petition division (*chambre des requêtes*).

The civil division (*chambre civile*).

The criminal division (*chambre criminelle*).

Among the forty-nine judges are included one first president, and one president to each division.

Each division has its duties, and holds its own sessions. On certain occasions they have joint sessions. The act by which an appeal is taken to the Court of Cassation is called a "*pourvoi*."

Petition Division: The petition division is a test section. It clears the way for the civil division. Whenever in a civil case a party takes an appeal from a decision of last resort, the record must be brought before the petition division first. This division examines carefully the petition, and decides whether it should be allowed or not, thus preventing the time of the civil division from being taken by ill-founded petitions. The procedure before the petition division is characterized by the fact that the applicant is not bound to notify the respondent of his action and to summon him before the court. The *pourvoi* consists in filing a brief or statement of error, and the respondent, being generally aware of the proceedings, has the right to submit

a counter statement giving his side of the question. The case is tried in open court upon the report made by a specially designated judge. In cases of urgency, this judge has a month within which he must file his report on the case. In other causes he has two months. When circumstances warrant such a course, the two periods may be extended. But if the judge fails to deposit his report within the time allotted, he is replaced by another. When the case is brought before the division, the appointed judge reads his report first, but he does not express his opinion. His duty is to explain the case, to make clear the arguments *pro* and *con*. The counsel for the appellant then argues the case, and finally the attorney for the state is heard in any remark he may have to make. The arguments being closed, the discussion in conference begins. The reporting judge expresses his opinion first, the president last, and the other opinions are taken following the order of appointment of the judges, and beginning with the latest. Should the petition be allowed, the court gives no motives for its decision, which is a unique exception to the rule that all judgments of all French courts must set out the motives on which they are based. If the petition is rejected, the case is dismissed, and the appellant loses the amount of a fine he had to deposit before his petition could be examined. This fine is 150 francs, and is raised to 300 francs if the petition is rejected by the civil division. The requirement of a fine to be deposited as a condition precedent to the admission of the petition is an old one, dating back to an ordinance of 1331. Dalloz, a French jurist, says concerning this fine, that by taking such a measure it was sought to make more difficult the use of appeals to the Court of Cassation, the effect of which must be reserved to extraordinary cases, and to compel the party who is inclined to appeal from a decision rendered against him to act with more careful thought.

When sitting, the petition division must be composed of at least eleven members, including the president. The decisions are governed by the majority rule, that is, half the number of votes cast plus one. In case of deficiency

among the sitting judges, one or more judges are called from another division, according to seniority. Thus it may happen that the petition division sits with an even number of judges. If the voices are equally divided, it is interpreted in favor of the appellant, and his petition is admitted. The prayer for reversal being granted, an order is entered to send the case to the civil division for final consideration and judgment.

Civil Division: It is the duty of the civil division to pass judgment upon all civil cases coming from the petition division, and to annul them if the grounds in the writ of error are found sufficient. The procedure before the civil division is a different matter. All parties are heard. Consequently, when a decree of admission has been rendered by the petition division, notification must be given to the respondent within two months. If the respondent has not been summoned during that time, the decree of admission becomes void. Both respondent and appellant appear in court by a counsel. The attorneys admitted to the bar of the Court of Cassation are limited in number. As officers of the court, they have the exclusive right of representing the parties, and they occupy a special position among the members of the French Bar. I have no space here to study the organization of the Bar of the Court of Cassation.

In ordinary matters, when a party, having been summoned in court, defaults, a judgment is granted against him in a summary way, without arguing the case. The fact that the defendant did not appear before the court raises a legal presumption that the plaintiff is right in his claims, and the court usually does not try the case. Before the civil division this rule does not obtain. In case of default of the respondent the cause is examined and tried as carefully as if he were present. As the decision of the court may reverse a previous judgment, it is desirable not to affect the authority of such a judgment without serious reasons. The defaulting party has the right to oppose the decision of the court, and to have a new trial.

The civil division always gives the motives of its decisions. The opinions are

taken and the votes cast, as explained before. But if there should be an equal division of the votes, five judges are called from the other divisions, following the order of seniority.

Criminal Division: The criminal division examines appeals in criminal cases only. But, contrary to the rule in civil cases, criminal cases are taken directly to the criminal division, without having to go through the test of the petition division. This difference of procedure is explained by the reason that the points of law involved in civil cases are more complicated and more important than those raised in criminal cases.

The civil and criminal divisions only have the power to reverse decisions. We shall see that the petition division eventually exercises the same power when the court is sitting *in banc*. The procedure, then, is the same as before the civil division.

Let us follow up a case from the time it is brought before the Supreme Court until it is disposed of. When a judgment is rendered by a lower court of last resort, the points of fact found by such court are considered as certain. The case is ended. The Court of Cassation, on an appeal, never examines the facts. Presuming that these facts are true, its duty is to declare if the law has been rightly applied to such facts. For this reason the Court of Cassation is not a new degree of jurisdiction. It does not try cases, it only inquires about the correct interpretation of the law or the observance of the forms of procedure. The lower courts are sovereign in judging the circumstances of the case. The Court of Cassation takes cognizance of the points of law only. As to the points of fact, it applies the rule, *Res judicata pro veritate habetur*; consequently no appeal on an error of fact can be taken to the court.

If the court finds that the law has been violated, or that the forms of procedure prescribed by the law have not been observed, it reverses the decision. But it does not try the case, as is the practice in the Supreme Court of the United States when it passes upon a writ of certiorari. The Court of Cassation does not judge the causes; it judges the judg-

ments. The case is sent back for a new trial before another court of the same rank as the court whose decision has been quashed. This court remains absolutely free to hand down a decision in harmony with the opinion of the Supreme Court, and, of course, the matter is settled. It may also render a decision similar to the first decision reversed. Should this happen, and should a second appeal be taken by the same party on the same grounds, the resistance of the second court shows that the conflict is serious. In such an occurrence the Court of Cassation will review the findings of the second inferior court always as to matters of law, but this time it must hold a special joint session of the three divisions *in banc*. A session of this kind is called "audience solennelle," solemn audience, and the decision rendered is known as "arrêt solennel," solemn decision, because the judges, at least thirty-four in number, must sit in red robes. If the decision appealed from is affirmed, the point of law at issue is settled. If, on the contrary, the Supreme Court reverses the decision of the second court, the record is sent back again for a new trial as above. But this time the lower court has no liberty. It must of necessity render a decision in conformity with the view expressed by the Supreme Court. We have seen that this obligation was imposed by the law of April 1st, 1837.

It must not be believed, however, that the arrêts solennels have the same effect as the law, thereby assuming the importance of the arrêts de règlement. They are compulsory for the last lower court only, and only in the cause under consideration. Any other court as well as the Court of Cassation is free to express a dissenting view or judgment in any subsequent case. It is true that the solemn decisions have a considerable authority as giving the carefully weighed opinion of the whole court on a point of law which has been the object of two dissenting opinions.

Christian Donnet

Japanese Courts

BY HON. GEORGE W. WICKERSHAM

Formerly Attorney General of the United States.

[Ed. Note.—This interesting description of Japanese Courts was written by Mr. Wickersham while in Japan in May, 1913, and is here presented by his courteous permission, as well as that of the Boston Evening Transcript, in which it appeared.]



SHORTLY before leaving Washington one of the Federal judges said to me, "When you are in Japan, you will, of course, visit the courts. After you have done so, write out an account of just what you see. I have often wondered how the procedure in those courts would impress an American, especially a lawyer, accustomed to our judicial tribunals."

During my recent visit to Tokio, I spent a morning in the imperial law courts, and, remembering what my judicial friend at home suggested, it occurs to me that your readers may be interested in a description of what I saw and heard and in my impressions of a very brief inspection of the courts in action.

An Audience with the Chief Justice.

Mr. T. Miyaoka, former Vice Minister of Foreign Affairs, and now one of the leading attorneys of the Empire, called upon me at the Imperial Hotel, shortly before 10 o'clock in the morning, and escorted me to the courthouse. This is a very large brick building, three stories high, looking much like the courthouses in a number of our American cities. The corridors, with the court attendants here and there, the lawyers hurrying to and fro carrying portfolios, sometimes followed by clerks bearing books or documents; the wandering crowds of idlers or witnesses or suitors,—all presented an appearance familiar to those who have to do with courts in our own land.

We went first to the office of the Attorney General, a functionary who is merely the principal Crown prosecutor, all the administrative functions which in

America are devolved upon the Attorney General being here vested in the Minister of Justice. The Attorney General received us pleasantly, but unfortunately he spoke no English, and I could exchange views with him only through the medium of my friend, Mr. Miyaoka, who speaks English with perfect fluency. The Attorney General then escorted us to the chambers of Mr. Yokota, the presiding judge of the Supreme Court of the Empire, and the highest judicial officer in Japan. This court, which is properly known as the Court of Cassation, is composed of twenty-four justices, who sit in divisional courts of five justices each, to which cases are carried on appeal from lower courts, for review of errors of law only. The court sits in banc in certain exceptional cases of grave importance only. Chief Justice Yokota received us most cordially. He spoke no English, but was familiar with German, having studied jurisprudence in Germany. The judicial system of Japan is modeled on that of Germany, and a number of the judges have been educated in that country. Tea—the inevitable tea, which accompanies all ceremonies, from a shopping visit to a formal call upon high officials—was served, and after a chat about the differences between the judicial systems of Japan and the United States, the chief justice told me that, unfortunately, no branch of his court was in session, but that a number of the intermediate courts of appeal and the district courts were then sitting, and that he would accompany us in a visit to them. He added that it had been a long time since he had been in any of those courts, and that he would enjoy seeing them once more.

Facing the Ornamental Judges.

So we left his room—a large, scantily, almost shabbily, furnished apart-

ment—and proceeded to one of the intermediate courts of appeal, where some fifty or sixty of the rioters who picked up a row in Kioto a few weeks ago—and incidentally brought about the fall of the last ministry—were being retried. They had been tried in the district court, and appeals taken from the judgments, both by the defendants who were convicted and by the government, as to some of those who were acquitted, to this court of appeal, in which the case was being heard *de novo*. We entered by the door from the judge's consultation room, and took seats behind the judges. They took no notice of our entry, but proceeded with the business in hand. The room was a rather large apartment, severely plain in its furnishings, and arranged quite like one of our own court rooms. The three judges sat in a row on a platform, raised about two feet above the floor, and at their right, a little apart from them, also on the bench sat the Crown prosecutor, while the clerk who was taking note of the proceedings sat on the left. The judges wore black gowns ornamented with a sort of embroidered cape, or yoke, of red braid, and a species of liberty cap with tabs of black crepe behind. The barristers wore the same style of gown, ornamented with white braid in a fashion similar to that of the judges, and the same sort of cap.

There were some fifty defendants seated on benches directly in front of the judges, and behind them their counsel, behind whom again was the usual crowd of court spectators. In the Japanese courts there are no juries, and all questions are asked by the presiding judge. Counsel for either side may suggest to the court the putting of a particular question, but the court may accept the suggestion or not, as it sees fit. When we entered, the presiding judge was calling the defendants for identification. Each man, as his name was pronounced, arose and replied to questions as to his age, residence, occupation, etc. Many of the defendants were students, and it was evidently the old story of turbulent youth in conflict with established institutions. Many of them had fine faces, and they arose and stood with quiet dignity as they answered the judge. Their rioting

was intended as a protest against the increase of taxation to maintain the military establishment only, and a warning to the government that the limit of burden upon a poor, patient, and industrious people had been reached. I should like to have followed the whole course of their retrial, but time did not permit, and we left them to visit one of the district courts, where a defendant was being tried for larceny.

In a Businesslike Atmosphere.

Again we found three judges, the Crown prosecutor, and the reporter, and the same arrangement as in the appellate court. The defendant was testifying in his own behalf. He stood directly in front of the presiding judge, not 10 feet distant from him, and answered his questions in a clear voice, without any apparent hesitation. The judge seemed conversant with the case, for he put questions rapidly, giving a funny little grunt of acquiescence after every answer. Occasionally one of the associates wrote a suggestion and handed it to the president, and once or twice the defendant's counsel asked the court to put a certain inquiry. The whole proceeding—and the same may be said of those in several other courts I visited—was conducted in a quiet, colloquial way. In every instance I was impressed with the simple businesslike atmosphere. The judges were proceeding without any fuss; the counsel, while respectful in manner, were very direct and easy in speech, making but few suggestions, and the whole burden of conducting the case seemed to fall on the presiding judge, even his associates seldom interfering.

Some of the Japanese lawyers with whom I have talked say that they feel that very often the court does not elicit all the facts, and that our system of having witnesses questioned by counsel would be better; but, on the other hand, some lawyers maintain that better results are realized by the system, which puts upon the court the duty of getting at the truth, maintaining that the witnesses are more apt to talk frankly to the court than to the lawyer for the opposite side who is engaged, as they think, in trying to make them out liars. Of course, as I

could not understand the language, I could only get a general impression derived from closely scanning the faces and the manner of the participants in the trials. In all of the eight or ten courts visited during the day, the same atmosphere prevailed, and so far as I could judge the court was patiently, impartially, and quietly probing the witnesses produced and finding out what they had to tell about the transaction in question. After the evidence is all in, and counsel have summed up, the court deliberates and agrees upon its judgment, which must be formulated in definite written findings of fact, followed by a statement of the legal conclusions resulting from them.

The System's Merits and Defects.

The judges whom I saw were worthy young men. They are appointed for life, but they receive small salaries, and I am told that many of them after eight or ten years' service on the bench resign and take up the practice of the law for which their judicial experience is considered as especially fitting them. The work of the bar is largely litigation, as, it seems, the people in Japan have not yet formed the habit of taking advice of counsel with regard to questions of law before getting into lawsuits. In one of the courts, the lawyers representing both sides were standing before the court as we entered, and after a general colloquy with the presiding judge lasting a few moments they bowed and retired. "It is a suit against a corporation for breach of some technical provision of the law," explained my companion, "and the counsel for the defendant wishes time to make sure what he shall say about it, and the judge, he says, 'Yes, you may take some

short time for that purpose.'" "I have heard of similar incidents in our American procedure," I replied. "When you don't know quite what defense to make, you ask for delay." Human nature is the same, despite differences of race, creed, and language, and courts of all civilized countries have much in common. I came away quite favorably impressed with what I saw, and wondering whether, on the whole, in 95 per cent of the cases, a decision by three judges, trained in the investigation of facts, would not be as nearly right as the verdict of twelve citizens casually gathered in from the general community.

I hear, and read in the English newspapers published in Japan, the complaint that in criminal cases the judges of the trial courts are too much influenced by the reports of the examining magistrates, or judges d'instruction, and that if the *procès d'instruction* develops evidence strongly adverse to the prisoner, it is almost impossible for him to escape conviction on trial. The instruction is, of course, *ex parte*, and a case may readily be built up against a prisoner, which on trial would not stand the test of cross-examination. But just here comes in the weakness of the Japanese system. There is no cross-examination, except such as the court chooses to adopt, and hence an impression of guilt derived from reading the record of the *procès d'instruction* may well determine the course of the presiding judge in adopting or refusing to put a suggested line of questioning to a witness. I do not pretend, however, to have formed any definite opinions concerning Japanese legal procedure from one day spent in their courts, but it has occurred to me that possibly an account of my visit might interest some of your readers.



St. Paul's Legal Experiences

BY EDGAR L. PENNINGTON, A.B., B.L.

of the Madison (Ga.) Bar



PAGES have been written on Solomon's remarkable decision, when a complaint in replevin was submitted at his bar and justice speedily administered. The trial before Judge Pilate is likewise the subject of careful analysis; the defendant availing himself of his fundamental prerogative and declining to make a statement, and the bench (in a manner sadly suggestive of our advanced era) not altogether calous to public opinion.

Still, however significant be the official reports of inspired chroniclers and however illuminating their subsequent annotations, we cannot overlook the legal experiences that confronted the "Apostle to the Gentiles." So much local color is revealed, and such a juristic atmosphere developed, in the simple scriptural account, that imposture is set to defiance, and our reason satisfied and our faith quickened.

In Jerusalem, for instance, an exercise of the Roman police power is St. Paul's deliverance from mob license (*Acts x.xi.*):—

30. And all the city was moved, and the people ran together: and they took Paul, and drew him out of the temple: and forthwith the doors were shut.

31. And as they went about to kill him, tidings came unto the chief captain of the band, that all Jerusalem was in an uproar.

32. Who immediately took soldiers and centurions, and ran down unto them: and when they saw the chief captain and the soldiers, they left beating of Paul.

Next he was taken into custody for his safe-keeping and identification,—a procedure prevalent to-day. But once under arrest, proud of being a citizen (v. 39), and familiar with his rights as such, he requested permission to speak. This

granted, and his discourse done, it was commanded that he "be examined by scourging." Then it is that we read the following (*Acts x.xii.*):—

25. And as they bound him with thongs, Paul said unto the centurion that stood by, Is it lawful for you to scourge a man that is a Roman, and uncondemned?

26. When the centurion heard that, he went and told the chief captain, saying, Take heed what thou doest: for this man is a Roman.

27. Then the chief captain came, and said unto him, Tell me, art thou a Roman? He said, Yea.

28. And the chief captain answered, With a great sum obtained I this freedom. And Paul said, But I was free born.

29. Then straightway they departed from him which should have examined him: and the chief captain also was afraid, after he knew that he was a Roman, and because he had bound him.

30. On the morrow, because he would have known the certainty wherefore he was accused of the Jews, he loosed him from his bonds, and commanded the chief priests and all their council to appear, and brought Paul down, and set him before them.

At the hearing that succeeded, the high priest would have the prisoner smitten in the mouth. Again the latter's acquaintance with the law was helpful (*Acts x.xiii.*):—

3. . . . Sittest thou to judge me after the law, and commandest me to be smitten contrary to the law?

It was soon discovered that the local sentiment was great. So, recourse was had to a change of venue. The Apostle was despatched to Caesarea by night, the better to insure his protection. A letter accompanying the expedition introduced the formal salutation:—

26. Claudius Lysias unto the most excellent governor Felix sendeth greeting.

Then the committing officer's excuse for participation is recited: that he interfered to assist the man, having "un-

derstood that he was a Roman" (v. 27), but that the alleged offense lay without his jurisdiction (v. 29).

The scene shifts to Felix, who allowed a continuance for cause,—the absence of material witnesses. He was detained in the meantime, pending the call.

35. I will hear thee, said he, when thine accusers are also come. And he commanded him to be kept in Herod's judgment hall.

After five days, the high priests and elders arrived, bringing with them their attorney Tertullus. The prosecution announced ready (*Acts xxiv. 1*), and the case was opened. In his efforts to convict, Tertullus, like several other barristers whom you will recognize, first sought to win the court's favor by endearing words.

2. . . . Seeing that by thee we enjoy great quietness, and that very worthy deeds are done unto this nation by thy providence.

3. We accept it always, and in all places, most noble Felix, with all thankfulness.

4. Notwithstanding, that I be not further tedious unto thee, I pray thee, that thou wouldst hear us of thy clemency a few words.

Specific charges were then preferred, and the prosecution rested. The answer was now in order, and "after that the governor had beckoned unto him to speak" (v. 10), St. Paul, who, while his own lawyer, had a skilled controversialist for his client, substantiated his position. One verse employed by him is clearly the prototype of a question we have often noted in arguments before the box,—

19. Who ought to have been here before thee, and object, if they had ought against me.

The liberty secured was a sort of probation. The modern analogy may be seen in municipal systems, where juvenile culprits remain in touch with the authorities and occasionally unfold their conduct.

At the judgment seat of Festus shortly, St. Paul obstinately asserted his privileges, even to that of appeal (*Acts xxv.*)

10. Then said Paul, I stand at Cæsar's judgment seat, where I ought to be judged: to the Jews have I done no wrong, as thou very well knowest.

11. For if I be an offender, or have committed any thing worthy of death, I refuse not to die: but if there be none of these things whereof these accuse me, no man may deliver me unto them. I appeal unto Cæsar.

The inferior tribunal could not decline the appeal; and Festus said, "Unto Cæsar shalt thou go" (v. 12). But he reviewed it all when King Agrippa came; Festus explaining his declaration that "it is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him" (v. 16). He told, also, how he had prepared for a speedy trial.

17. . . . Without any delay on the morrow I sat on the judgment seat, and commanded the man to be brought forth.

The ceremonious opening of King Agrippa's court is described (v. 23). Immediately Festus lays the proposition before his Majesty, and concludes in language that convinces us there is nothing new under the sun, not even the Bill of Rights.

27. For it seemeth to me unreasonable to send a prisoner, and not withal to signify the crimes laid against him.

Agrippa was attentive to the respondent's utterances; but any decision of his would be worthless, as the issue had passed beyond his control (*Acts xxvi.*)

32. Then said Agrippa unto Festus, This man might have been set at liberty, if he had not appealed unto Cæsar.

It may be added that the Epistles of this gigantic intellect are replete with references to the human legislation under which he lived; the sovereignty of it he always acknowledged. Evidently, like his master, he was ready to "render unto Cæsar the things that are Cæsar's."

Edgar L. Pennington.

A Lawyer's Justification of His Profession

By IRA F. THOMPSON

Of the Los Angeles Bar



OF LATE years, perhaps no branch of the government has been more discussed than the judiciary, and at that not always in the most favorable light. No other profession has been subjected to more adverse criticism than the lawyers. It is the purpose of this article to express a lawyer's point of view on the subject with as little prejudice as possible, and not with the idea that it shall be at all convincing, but in the hope that some of the remarks may lead to investigation, and after investigation to a changed belief, particularly on the part of those who have heretofore given the matter but little concentrated thought.

It is not surprising that the profession as a whole, including the judiciary, should be misunderstood, any more than it is not surprising that the ideals of the entomologist should be misinterpreted, and his work into the late hours of the night be denominated "fanatical bugology." The latter sees in his endeavors the ultimate freedom of grain, vegetables, and fruits from parasitical animal life, and the former, be he as honest as the spirit of his code of ethics demands, sees in his efforts the safeguarding of the principles of freedom of life, liberty, and property, as well as the slow but certain progress to enlarged freedom and a clearer communal sense of equity and justice. The importance of these ideals is far greater to the reputable attorney than the specific case at issue, in just the same proportion that the final success of the entomologist is of far more importance than

one experiment. This is all by way of mutual understanding, in order that we each may have the same basis from which to judge hereafter.

Technicalities.

Much has been said and written concerning the technicalities of the law, but very often the reason for these has been neglected. An example which might be cited as a case of technicality, yes even an offense, if you please, for which a judge in some jurisdictions might be recalled—and by technicality I mean a decision which is founded upon the application of a rule of equity or law of such long standing that its principle may not be apparent, a great many of which can be found in any written Constitution or the statutes of any state. Suppose that the legislature or the people, through the initiative, pass an act providing, in substance, that no man should contract to be employed at manual labor for a longer period than ten hours out of each successive twenty-four hours, and for not more than sixty hours out of each successive week, or one hundred and sixty-eight hours. Now, let us not enter into a discussion of the merits of such legislation, but confine ourselves to the point that the judge who hears the first case arising out of it denounces the law as unconstitutional, and as an attempt to undermine the very foundation of political and commercial freedom. How many people are there ready to condemn the judge for being blind to the demands of progress and barnacled with stale and time-worn precedents? Let us glance cursorily and with no great degree of exactness at the principles which led that court to its conclusion. Was it a desire to serve the

pleasure of so-called big business and give it one more opportunity by bulldozing methods to compel men to work at starvation wages for from fourteen to fifteen hours a day seven days in the week that compelled that judge to so determine, or was it rather that he foresaw in the light of his investigation of just such attempts for hundreds of years by and through the channels of those "stale and timeworn" precedents, the forerunner or perhaps the complete destruction of our political and commercial freedom? Any reputable attorney would tell you in such a case that the judge was right; that if one law should be allowed to stand which would annul a man's right to contract in any way that he saw fit, that a dozen, a hundred, yea, any number of laws could be passed contrary to and negating the freedom of contract, until neither you nor I could enter into any contract without the approval of some branch of the government, or rather of some potentate who, even after consent, might change his mind. Therefore, we see by the simple illustration afforded, that the judge has as his ideal the safeguarding of our freedom and the sense of applying this ideal, highly developed, owing to the analysis of thousands of precedents along this and similar lines. The belief that his decision was ever based on an unreasoned and useless technicality gives way to the knowledge of the purity of motive and duty.

Fixed Principles.

This brings us to a very interesting and latterly much-discussed proposition; namely, why should there be any hard and fast rule by which these things should be determined? In other words, why, if a law is declared unconstitutional, should not the people have a right to recall the decision? Or, to put the proposition in purely simple English, why should the judge be bound by fixed principle, rather than be able to pass upon the constitutionality of the act according to whether he deemed that a majority of the people desired the act and according to the political exigencies of the situation? There are those who will object to the last phrasing of the proposition for the sim-

ple reason that it is brutally frank. Nevertheless, a moment of thought, unbiased and uninfluenced by any sense of overpowering greatness or personality, will convince us of its logic. If the question be "Why," let us seek an answer.

In answer, may I be pardoned a ridiculous question? Do flowers grow by chance or caprice? Does the sun rise by accident? Is the law of chemistry or of mathematics varying or fickle? Should we, in molding and determining laws for our own government, strive for less principle than it is possible to attain? It is not possible, perhaps, for us so long as we create the laws for our own government to have as much exactness or principle as nature, but should we not strive in that direction, rather than to build a glorious house of Babel? We find then, I believe, that the judge who has the courage of his ideal in the face of popular clamor is persistently standing for the further progress attendant upon right and just principle; by his very decision he has added one more election to the weight and stability of the principle long learned to be just, and has added one more illustration from which the community may learn the justice of the rule. He has rendered at least one jot clearer the communal sense of equity and justice, and we are one mite nearer the goal to which the law of infinity leads.

Another point of view from which we may better judge of the advisability of fixed and unvarying principle may be found if each of us will mentally picture himself in absolute control of a large community of people and of the enormous problems to be met and adjusted to the greatest benefit of that community. Let every soberly inclined man or woman who has a fair idea of civic duty ask himself, if put in such a position, if he would be more capable in the management thereof, if imbued with a greater or less appreciation of the unchanging, unvarying, infinite laws of equity and justice? The more clearly these could be conceived, the more perfectly and harmoniously and, therefore, progressively, would the affairs of state move on, there being freedom from political, commercial, or social inequality. As a matter of fact, the words, "equality and principle," are

almost antonyms to caprice or popularity. Fixedness or certainty then becomes in itself idealistic.

Criticism Due to Misunderstanding.

May we then hastily consider if the lawyers as distinguished (if we may use the phrase) from their higher strata the judiciary are entitled to as much indignant criticism as falls to their lot. I should much rather say as much misunderstanding; for, after all, it is a misconception of the deep-seated and seldom explained motives of the profession, which engenders the adverse remarks. The business man or layman is no more responsible for this than the attorney himself, and neither, in the majority of cases, is to blame. We do not misunderstand the motives of friends, but often those of strangers. Very often the difference in perspective of lawyer and client remaining unexplained makes total strangers of them so far as common ground of point of view is concerned. A variance of opinion can be easily come upon and very easily in the matter of fees, which is the cause of most attacks outside of the one which perhaps has been hastily covered relating to decisions on technicalities on the part of the judiciary, and the remarks there made are equally pertinent to the attacks on this ground on the practising attorney.

I do not mean to state that every attorney who handles a case is consciously impressed with the necessity of winning that case for the sole purpose of safeguarding our political freedom. What I do say is this,—that although the profession is here and there infested with the undesirable, every reputable attorney is fundamentally possessed of those ideals.

It often happens in these days of commercialism that the attorney neglects their expression or realization in a somewhat, although I do not believe in as exaggerated a form as a great proportion of the business men forget to realize that their business is to eliminate cost, increase service and durability to the end that the community at large may progress in material prosperity; to relieve so far as possible the limitations of poverty or near poverty; and to increase the effi-

ciency and harmony of each member of the community. I may be mistaken, but I believe that a far greater proportion of the business men forget to a far greater degree the real excuse for the existence of their business than occurs in the legal profession, but notwithstanding that fact, a man in business must flourish only as a mushroom, or, in his endeavor to meet advanced ideas in competition, he must continually work for the betterment of mankind. Such is the law of economy, fixed, determined, and unvarying. So it is in the legal profession. Sometimes a lawyer will spring into prominence, or notoriety (I prefer the latter word), overnight. Perhaps he may have won a difficult case on what he knew was at least a mistaken idea of the facts, but that man can only prosper shortly. If the public would realize that in every case there is at least one lawyer and one judge focusing and concentrating all of his power to uncover the weakness of such a case, it would readily appreciate that dishonest or unprofessional tactics can avail a man but a very short time indeed. Such attempts, however, are rarer than most laymen realize. On the other hand, the lawyer is constantly and continually harking back to the precedents, and not for the wording of the case, but for the principle of justice which it enunciates. Those old decisions, which it would seem to the uninformed have long outlived their usefulness, are crammed with equitable principles which are fully as applicable to conditions to-day as they ever were. Justice never changes.

The instability of the law, or the prevalent idea that it can be twisted here and there to meet the necessary occasion, is due again to a misconception of its nature. It must, as we have seen, be subject to fixed rules in order to be equal, but the application of those rules is just as complex a task as all human endeavor added to all human motives is complex. It is a task almost sufficient for one man to bring his own motives, exclusive of all others, into harmony. Then how much more of a task is it not only to harmonize all human motives and reduce them to a working rule which will result in good for the greater number of people, but also to analyze human endeavors for the pur-

pose of determining the fundamental and prevailing motive which actuates the endeavor? If we may look at it from this standpoint, and I am personally convinced that such is the standpoint of every conscientious lawyer and jurist, we shall have gained an idea that is not only uplifting, but also explains why the law seems capable of being twisted to meet the particular purpose. The fundamental rule of justice is that equity in the particular case shall be preserved if the rule thus established can be harmonized with the rules which have been learned through long experience to be just and conducive to the greatest good for the greatest number of people.

An illustration, and one which may appeal to those not versed in law, may be found in the following statement of facts:

John Jones agrees to take charge of and manage the lemon grove of Robert Rogers for one year at a salary of \$100 monthly. This agreement is reduced to writing. Six months later, Jones thinks he has made a bad bargain and refuses to continue unless he gets \$150 per month. Rogers agrees to this amendment, but nothing is reduced to writing. Jones works for another month, and Rogers pays him \$100 and refuses to pay more. Jones sues for the additional \$50 and learns when he gets into court that no testimony will be received from him that Rogers agreed orally to an increase in salary. Other parties find themselves situated in a similar position, except that the employer has for two months paid the employee the increased salary, and they come into court for the purpose of settling the difference between the original contract and the increased price for the third month at the increased price; and assuming consideration for the purpose of illustration, the court receives the evidence and gives the employee his additional wages. Surely, to the man who has not expended some effort in an endeavor to learn why these things should thus occur, there seems little difference between the cases, except the whim of the court.

On the other hand, to the man who has given the matter any study at all, the distinction is as simple as the multipli-

cation table to the mathematician. Any man without legal training can figure the correct answer if he has the right basis from which to start. If he will remember, first, that all testimony shall be guarded by such rules as will secure truth in its giving; and, second, the communal equity of the situation,—he will come to the same conclusion as the court; but in order to do this, he must have profound knowledge of human nature, of motives as determined by acts or endeavor. Let us test this illustration, although simple, by such a standard. In the first instance, we find a written contract claimed by one party to have been altered. In this event, why was not the alteration in writing? Did they not think enough of the change to give the amendment as much formality as they gave the contract originally? Does not this inaction or inattention suggest immediately that the employee is, to say the least, mistaken? Furthermore, should not the state, speaking through the legislature and judiciary, endeavor to protect the honest against the dishonest by announcing a rule to the effect that if you wish to change an instrument you must do it by just as formal an act as originally, otherwise we shall assume your story untrue? This rule is one designed to secure the truth in the giving of testimony. The fact that it is sound is proven by the very thought,—“well, if it was changed, why didn’t they write it down?” Now, on the other hand, the reason for the rule thus enunciated by the legislature and the judiciary has completely disappeared in the second case, because if we are to judge motives by acts, we must feel inclined immediately to believe that the employer would not have parted with the increased wage for two months unless the employee’s story be true. Thus, it is throughout the law, and the illustration aptly describes all of the seeming inconsistencies of the law.

So, again, this criticism of the profession arises from misunderstanding. If I could conceive of any method by which a man of high ideals, one possessed of a far-seeing sense of justice, could learn to determine correctly, even in a small measure, the hidden motives and intentions of mortals by their acts, and endeavor, other than by the study of rules

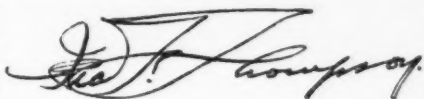
of law found in cases and text books thereon, I should venture to allow that man to practise law. Then he would realize upon what seeming trifles lawsuits depend, for he would discover that in those very little things hangs often the true test of intention. Yes, to go even one step farther, if I were asked for as short a definition as possible of the real science of jurisprudence, I should answer that it was the science of determining human motives and intentions by human acts or formal declarations, and of endeavoring so far as possible to allow to prevail only those motives which tend toward progress.

Several times we have mentioned misunderstandings as being responsible for criticism, and have found that several things which seemed peculiar are very clear and very near right. A great deal by way of explanation could be written; in fact, volumes; but I hope that what has been said is sufficient to convey the impression that the profession of law is not related to the practice of an occult art, but rather one of profound science, to wit, the science of nature. Why this is not more clearly understood is due to several reasons.

First of all, most business men, except on rare occasions, are loath to discuss frankly the study of human nature, except from their own standpoints, and therefore the lawyer has acquired the habit of explaining nothing more than he is compelled to. Secondly, the lawyer gets to the point where, to discuss such matters in a manner intelligible to the ordinary client, he must approach it from such an elementary standpoint as to be infinitely more painful to him than the explanation of addition to the worker of higher mathematics, and also run the danger of being dubbed a "shallow fellow," rather than one equipped with sufficient intelligence to care for the case at hand. Thirdly, while I believe the judges suffer from the same cause of vocal paralysis, most of them are sufficiently burdened with work and problems to be willing to allow their decision to speak

for itself. Fourthly, and not least in importance, is the work of a certain class of politicians who would like to see the judiciary under the more absolute control of some branch of the government, more easily controlled, or, to put it more simply, to see the judiciary more humble in politics, and for that reason take advantage of decisions apparently not satisfactory to the then popular will to bring the judiciary into disrepute. I do not mean to intimate that all judges have been free, fearless, and as devoid of political affiliations and prejudices as they should be, although in this connection my belief is that the majority have been far more conscientious than seems to be the impression of a great many people. Generally, the judge who often sacrifices financial interests for the privilege of sitting on the bench is not paid the respect to which he is entitled.

Be that as it may, however, I think that a great deal can be done to settle confusion as to what the judiciary and the profession as a whole represent. Never before in history has there been among business men as a class, or farmers as a whole, such an effort toward understanding not only their own particular business, but all business connected with it in any way. Perhaps some day every person will realize that the legal profession in some way affects him, and the lawyer will learn that his client is entitled to an explanation, and the judge will endeavor to couch his remarks in such phrases as to be intelligible to the layman, and then we shall have a mutual understanding. We shall be friends on the subject, and all realize that we are working according to our highest light. The layman will understand why the old practitioner invariably advises the young man, seeking advice, never to take up the work unless he "loves the law."



His Widow's Sister

BY H. S. FARRIS

Of the Bozeman, Montana, Bar



ON THE 13th day of March, A. D. 1907, a committee of five attorneys of Valdez, Alaska, met in the office of the clerk of the district court. For two solid hours they fired questions at John Jenks, applicant for admission to the Alaska bar. It was two hours of torture for John Jenks. He sat meekly and timidly on the extreme edge of his chair, and answered each question slowly and methodically. The questions were answered correctly too, and John Jenks knew that he was passing his examination with flying colors. At last came this final question from the chairman of the committee.

"What was the trial by battle?"

John Jenks gasped; "I do not know, sir," he answered. It was the first question he had failed to answer.

"Well, hanged if I know either," said the chairman of the committee. "I now extend an invitation to this committee to partake of a little liquid nourishment," he continued: "As for you," and he admonished John Jenks with a thick forefinger, "I'd include you in this invitation, but you never drink. As to your examination, we haven't voted on you yet, of course, but I think you'll be safe in having a shingle painted." So it was that John Jenks, combination law clerk and stenographer for Amos Burns, was found to be "possessed of the requisite learning and ability to practise as an attorney in all the courts of the territory of Alaska."

On the following day John Jenks timidly approached his employer. In his hand he held a somewhat oversized aluminum-lettered sign,—*"John Jenks, Attorney at Law."*

"Well, what do you want?" inquired Amos Burns, brusquely.

John Jenks exhibited his shingle; "I

would like your permission, sir, to hang this sign. I thought we might make some sort of arrange—"

"You've got my permission to hang that thing anywhere in Valdez except in front of my office," interrupted Amos Burns. "What's the matter with you anyhow? Ain't you satisfied with our present arrangement?" he continued.

John Jenks was embarrassed. "I'm well satisfied sir,—in a way. You've treated me fairly enough, but you see, I'm figuring on getting married, and I can't support a family on \$75 a month."

Amos Burns took a close survey of his clerk. His keen eye ranged from the cracked, dry weather shoes to a gaudy white and blue checked tie. The tie fascinated him and deprived him of his power of speech for a moment.

"How long has this been brewing? Who is the girl, and where does she live?" he asked, finding his voice.

The new member of the Alaska bar answered his chief's questions in the order presented. "I've been engaged ever since I've been in your office. She's a girl I went to school with in Oregon before I came North, sir."

Amos Burns was thoughtful. "And so you're thinking of getting married!" he snorted. "Better forget marrying 'till you prove you're a lawyer. You're admitted to practise all right, but you'll never make a lawyer till you quit going 'round apologizing to all the world for your existence."

With more than the usual droop to his shoulders, John Jenks started to leave the room.

"Just a minute!" snapped the old lawyer. "Look here, John, I'll give you a chance to prove you're a lawyer, and when you prove that to my satisfaction, you'll be in a position to marry. Listen!" and Amos Burns shook his glasses impressively at his clerk. "Go back to work, and whenever the time comes that I'm wrong on a proposition—and you're right—I'll give you at least \$100 a month

and a percentage of the business. I don't care what the proposition is, so long as you're right and I'm wrong. I'll make you my partner,—but for heaven's sake, leave that tie at home when you come back tomorrow."

"Thank you—yes, sir;" said John Jenks.

For the next three months John Jenks worked as usual, faithfully and methodically. He spent his evenings reading law and pondering over the conditional promise of a partnership with Amos Burns. But how was he to prove his chief in error and himself correct on any proposition, especially when the judge must be Amos Burns himself. They seldom discussed a point of law. On the few occasions that he had dared ask his chief how to proceed in some minor matters, the answer had invariably been, "Follow your Code, follow your Code. That's what the Code is for,—to be followed; and that's what a lawyer is for,—to follow it." Then there was the advice he received only two weeks ago, which he would never forget. "When you're speaking in public, John, never be embarrassed; just remember that half the people don't know what you're talking about, and the other half don't care a damn."

One evening John Jenks entered the Tillicum club quietly and unobtrusively. He seldom went to the club, and when he did it was for the purpose of speaking to Amos Burns. On this occasion he waited an hour before his opportunity came.

"What do you want?" asked Amos Burns when his clerk approached at last.

"I don't like to bother you at this time, sir, but I have a little point that troubles me, and I'd like very much to know what you think about . . ."

"Well, well, come on with it,—get it out of your system," interrupted Amos Burns.

Inwardly nervous, John Jenks was outwardly quite calm. "Can a man marry his widow's sister in Alaska, Mr. Burns?"

Amos Burns was at his best when expressing his opinion on any topic before his friends. He raised his voice so that he might be easily heard by all present. His chest expanded visibly.

"Hm! Certainly a man can marry his

widow's sister in Alaska, or anywhere in the United States," he boomed; "why, that also holds good in England, since the deceased wife's sister's bill passed. It was the most idiotic farce of a law that ever existed anyhow. Fancy a more ridiculous law than one preventing a man marrying the sister of his deceased wife." And Amos Burns challenged those present with a glance of defiance.

John Jenks's huge Adam's apple bobbed nervously. There was no other trace of excitement. "This is a point that I wished to be quite sure about, and I did feel sure that a man could not marry his widow's sister in Alaska. Of course . . ."

"Of course nothing! You're wrong; there is absolutely nothing to prevent a man marrying his widow's sister," said Amos Burns.

John Jenks edged timidly behind a table before replying.

"Wouldn't it be prevented, sir, by reason of the fact that the man is dead?" he asked in a high quavering voice.

Amos Burns's face was a study in expression as the fact slowly dawned upon him that his clerk had been trifling with him. He glared at the crowd a moment, then raced around the table after John Jenks, who avoided him awkwardly, to the great delight of the crowd. Exhausted at last, the old lawyer faced his clerk, the table safely between them.

"You long-legged giraffe, what do you mean, you mean by attempting to perpetrate an insane joke on me? What do you mean, you—you—?"

"It is no joke with me, sir. I've been thinking of this for a long time. You told me three months ago that if I was ever right on any proposition, and you were wrong, that you'd make a partner of me, and . . ."

"I'll make a partner of you!" bellowed Amos Burns; "I'll make a—a—"

Slowly his voice lowered, and at last a smile softened the shrewd old face.

"Why, by gad, I will make a partner of you," he said.

"Thank you, sir," said John Jenks, respectfully.

The old lawyer extended his hand. "Cut the thanks, and cable the girl," he said.

Editorial Comment



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Begging the Question

THE reluctance to abide by general rules of law or contractual stipulations having for their object the exclusion of parol evidence to establish the existence or terms of a contract, when the court is, as a matter of fact, convinced, though by the proscribed evidence itself, of the truth of the claims based on that evidence, has led to many attempted refinements and distinctions which not infrequently do more credit to the desire of the judges to mete out justice as they see it in the individual case than to their logical acumen.

A common fallacy in the reasoning by which the courts seek to justify their

departure from the rule of law or stipulation of the parties lies in the tacit assumption as the premise of their argument that the parties did in fact enter into a parol contract, or did agree upon terms contrary to the import of the written instrument. Admitting that premise, their argument and conclusion are generally unassailable, either from a practical or logical standpoint. It is obvious, however, that the premise itself involves a violation of the rule or stipulation, and the mischief against which it was aimed has already been accomplished before the argument has been commenced. Appellate courts are peculiarly susceptible to this form of illicit process, for the reason that the cases generally come before them with findings by the jury or trial court, based on parol evidence, of the existence, or terms, of the contract, and those findings are accepted as verities, in accordance with the general rule that the appellate court is bound by the findings of fact below. This has a tendency to obscure the point that the real question is whether the trial court was justified in considering parol evidence at all, and not whether the rule or stipulation excluding parol evidence ought to be applied so as to defeat a party who has in fact made a parol contract.

Naturally, when the court proceeds upon the assumption that there was in fact a parol agreement, the rule or stipulation which requires written evidence assumes the appearance of a mere hazard or pitfall to be evaded if possible. From some of the opinions on this subject, one would almost conclude that the court regarded the rule or stipulation as a mere technical obstacle to the accomplishment of justice, serving no practical purpose whatever, or a kind of sporting proposition challenging the resource and ingenuity of the courts to devise ways and means to counteract its malign effect.

For example, the argument supporting the doctrine of part performance by which a parol contract is taken out of

the statute of frauds in relation to agreements concerning real property, very commonly proceeds upon the tacit assumption, based on parol evidence, that there was in fact a contract, and from that assumption the conclusion naturally follows that to apply the statute would be to work a fraud, or, as is sometimes said, would "make the statute a statute of frauds indeed." It is to be observed that the criticism is here directed against the reasoning frequently invoked in support of the doctrine, and not against the doctrine itself; for it would seem that a rational explanation of the doctrine might be found in the view that the acts relied upon as part performance, not being entirely dependent upon the honesty, or accuracy of the memory, of the witness, are to be regarded as corroborating the parol evidence, which consists merely of the testimony as to verbal acts or statements, thus furnishing, in combination with that evidence, an equivalent of the writing required by the statute, or at least mitigating the mischief against which the statute is aimed of establishing a contract by mere parol evidence, the value of which depends wholly upon the honesty and memory of the witnesses. (See *Browne on Statute of Frauds*, § 455.) As already intimated, however, in many cases the acts of part performance are not relied upon as independent or corroborative evidence of the existence of the contract, but simply as showing the fraud or hardship involved in applying the statute to defeat the enforcement of a parol contract, the existence of which is tacitly assumed to have been established by the other evidence.

Another illustration of the fallacy is furnished by cases holding that a building contractor may recover for extras ordered orally, notwithstanding an express stipulation in the written contract that the owner shall not be bound to pay for extras unless ordered in writing. (See note in 48 L.R.A.(N.S.) 564.) The courts profess to place these decisions upon the ground that the stipulation requiring a written order may be waived, and is waived by the oral order. Assuming that the owner did orally order the extras, or assuming at least that he

orally agreed to pay for them, it is not to be denied that he ought to be held to his promise, notwithstanding the stipulation requiring a written order; and it may be admitted that that requirement may be waived, or even that it is waived by an oral order, if such order is admitted by the owner; but if the owner denies giving an oral order no predicate can be laid for the waiver without violating the stipulation, the very purpose, of which, was to guard the owner against intentionally false or mistaken claims by the contractor.

Another illustration of the tendency of the courts to accept upon the faith of parol evidence the existence of a fact which the rule or stipulation in question declares can only be established by writing, and upon this assumption to demonstrate that the rule or stipulation ought not to be applied, is found in the many cases holding an insurance company estopped to assert the falsity of an answer in the written application, when it appears that the question was answered correctly by the applicant, but that his answer was incorrectly transcribed in the application by the insurance company's agent, notwithstanding stipulations in the application, signed by the applicant, to the effect that the written application is the sole repository and exclusive evidence of the answers, and that the company shall not be bound by statements made to, or by, the agent unless incorporated in the application. (See notes to *Deming Invest. Co. v. Shawnee F. Ins. Co.* 4 L.R.A.(N.S.) 607; and *Suravitz v. Prudential Ins. Co.* 53 L.R.A.(N.S.)). Here again, assuming the fact which the parol evidence tends to show, it may be admitted that the company ought to be estopped, but the real purpose, or at least part of the purpose, of the stipulation, has been violated by the admission of parol evidence to establish what the parties have agreed can only be shown by the written application.

The real underlying reason for the position taken in these cases, though obscured even to the vision of the courts, appears to be the ingrained and scarcely conscious distrust on the part of the judges of the efficacy of general rules, though in themselves based on sound pol-

icy, as universal solvents for all cases falling within their terms. Doubtless, in many cases, what may, perhaps, be termed a practical injustice has been avoided by an illogical departure from the general rule excluding parol evidence, for the reason that in the particular instance the parol evidence, though of exactly the kind which the rule or stipulation denounces as too unsatisfactory and uncertain to form a basis for the determination of the rights of the parties, was, in fact, true. It is obvious, however, that if the court may and will relax the rule or stipulation when the parol evidence is sufficiently persuasive to carry conviction to its mind, the rule or stipulation itself has been degraded and reduced from the rank of a positive prohibition of the admission of parol evidence—or what is equivalent, a prohibition against the determination of the particular question of fact upon such evidence—to the position of a mere rule of presumption, or, at best, a rule requiring a high degree of parol evidence to establish the fact. Thenceforth, any suitor who may see fit to tender upon parol evidence an issue of fact may require the other party to meet that evidence, and compel him to submit to the determination of his rights by a court or jury upon the very kind of evidence against which it was the purpose of the rule or stipulation to protect him.

The real justification for a general rule established by statute or decisions, or an express stipulation of the parties, against the determination of a particular question or questions of fact upon parol evidence, is the fallibility of jurors or courts, who might otherwise be called upon to determine such questions upon parol evidence. If courts and jurors were infallible, and could always be relied upon to detect perjury or mistakes of memory, there would be no sound

reason for such a rule or stipulation, and no real injustice involved in ignoring it. Unfortunately, however, neither courts nor juries are infallible, and the chances of their being imposed upon by perjured or mistaken testimony of witnesses, which may relate to transactions occurring many years before the time of the trial, are so great that the legislatures or courts have seen fit to declare in effect that certain questions shall not be submitted to them at all upon parol evidence; and in other instances, the parties by their express stipulation have attempted to avoid the dangers incident to the determination of their rights on this kind of evidence.

It is apparent that, however honestly one may intend to deal, and does deal, with his fellows, he may need the protection of the rule against parol evidence, or may with perfect propriety desire to protect himself by stipulation against the dangers of perjury or mistake inherent in parol evidence. The rule or stipulation, however, is a broken reed if it fails upon the only occasion when he really needs it, that is, when the adverse party can make a sufficiently plausible showing upon parol evidence to carry conviction to the minds of the trier of the facts.

At the best, the relaxation of the rule or stipulation in order to relieve an honest suitor from the consequences of his own folly in failing to embody his contract or agreement in writing is at the expense of subjecting every person otherwise within the protection of the rule or stipulation, although guilty of no fault whatever, to the risk that a dishonest or mistaken, but plausible, witness may be able to convince the jury, contrary to the fact, of the existence or terms of a contract, in the face of a rule or stipulation, the purpose, and the only purpose, of which is to prevent just that possibility.

GEORGE H. PARMELE.





Readers' Comments

In Re Haddock and Atherton Cases

EDITOR CASE AND COMMENT:

I find myself in accord with the minority decision in the case of *Haddock v. Haddock*, which has left our interstate divorce law in considerable doubt.

In the *Haddock Case* Mr. Justice White seemed to explain the decision in *Atherton v. Atherton* on the ground that the wife unjustifiably left her husband. Because of that fact she could not acquire a separate domicile of her own but was presumed to be domiciled with her husband. Both parties, therefore, being domiciled in Kentucky, the courts of that state had jurisdiction to render a valid decree of divorce, which would be binding, not only in Kentucky, but, by reason of the full faith and credit clause in the Federal Constitution, in all the states of the Union.

But, may I ask, did not the Connecticut court in the *Haddock Case* render a decree of divorce on the ground of the desertion of the wife? If the reasoning in the *Atherton Case* was carried to its conclusion in the *Haddock Case*, both should have been decided in favor of the respondent, as was done in the *Atherton Case*. In that case the state court found that the wife without justification left her husband; because of that her domicile was with his, and the court had jurisdiction, according to the reasoning of the Federal Supreme Court, to render a valid decree of divorce, binding everywhere, and the New York court was held to be bound not only by the fact of the divorce, but also as to the justification or lack of justification in the wife in leaving her husband.

In the *Haddock Case* the supreme court of Connecticut found that the wife deserted her husband. If the reasoning of the *Atherton Case* was followed out, the domicile of the wife in the *Haddock Case*, because of her

desertion, continued to be with her husband in Connecticut; therefore, according to the *Atherton* reasoning, both parties being actually or constructively domiciled in Connecticut, that court had jurisdiction to render a valid decree binding throughout the United States.

I should distinguish the two cases, not from their facts, but from the holding of the Supreme Court.

So long as a husband is ready and willing and provides a home for his wife, she is domiciled constructively with him, and cannot establish an independent one.

In both the *Haddock* and *Atherton Cases* the first trial court found that the wives were guilty of desertion, so, of course, both remained constructively domiciled with their husbands, and the Kentucky and Connecticut courts had jurisdiction. In the *Atherton Case* the Supreme Court would not allow the New York courts to take up anew the question of the wife's justification, and in the *Haddock*, it did. There lies the distinction.

Boston, Mass.

FRED H. FISHER.

"Pure" is Pure English

EDITOR CASE AND COMMENT:

Noting the statement submitted by the attorney general of New Mexico, on page 422 of volume 21, *CASE AND COMMENT*, on the subject of the use of the word "pure" or "purely," in which certain uses thereof are termed "eighteenth century slang," you are referred to the *Century Dictionary*, where you will find that the use of the word "pure" is recognized as being susceptible of the use shown by this statement, and that such use is in no sense to be termed slang.

Similar use of the word "pure" is to be found at this day in communities in Kentucky and other Southern States where seventeenth and eighteenth century English is still spoken in its purity.

Madisonville, Ky.

M. K. GORDON.

Anti-Liquor Legislation

Editor CASE AND COMMENT:

I am a recent subscriber to your splendid magazine, and I have just read with much interest the article in your July number entitled "Some Fundamental Errors of Our Anti-Liquor Laws," by Mr. Lee J. Vance. I am surprised that you would publish this article. Not that there may not be some errors in our anti-liquor laws, but because of the failure of the author to point out any real fundamental errors in those laws.

The author starts out with the proposition that "many of the judicial opinions reflect all the prejudices of the promoters of anti-liquor legislation," citing one of the leading cases of this state, and leading cases from a number of other states. And again: "Some of these opinions bear all the earmarks of the narrow spirit and the casuistry of the theologian," citing some of the leading cases of our honorable United States Supreme Court. Is it not strange that all of these judges should have erred along the same line and to about the same extent? Is it not strange that all this has just been discovered,—especially when we consider the great length of time these questions have been before the courts of this country, and the wonderful array of legal talent which has argued these same questions?

Without discussing the relative merits of these questions, let us see if there are not some fundamental legal propositions at the basis of all of this sort of legislation. Note the Preamble of our national Constitution: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Many of the states, including this state, have incorporated this preamble, or its equivalent, into their own.

What does this phrase, "promote the general welfare," mean any way? Is it just a group of words without meaning? Was there nothing definite in the minds of that great body of men who drew up this Constitution, when this phrase was placed therein? I think there must have been some very definite ideas in the minds of those men, and of the great majority of the people who voted upon its adoption. They were determined to have a real United States, and to do everything in their power to form a more perfect union and to promote the general welfare of the people of those United States. In other words, they knew that many laws would be placed upon the statute books of the United States and of the several states, which would be contrary to the wishes and detrimental to the interests of many of the people, but that, if those laws were necessary to form this more perfect union and for the general welfare of the people, they would, and ought to be, adopted.

Therefore laws of this character have been

passed, as: anti-slavery laws; laws prohibiting the sale and manufacture of certain patent medicines, drugs, etc., or regulating the same; laws prohibiting or regulating gambling, lotteries, houses of ill fame, dance halls, certain forms of dancing; laws regulating the construction of houses, etc.; and the sale and inspection of meats, foods, etc.; and many other laws designed solely for the protection of the health and the promotion of the general welfare of the people. Can it be argued that the law guarantees to the owner of a gambling joint that his business will never be restricted or perhaps prohibited? Or can the manufacturer, who has built up a fine trade in a certain patent medicine, claim that he is guaranteed protection in the conduct of his business, and that any restriction or regulation of this is illegal? Nonsense. The good of the few must always give way to the good of the many. Our form of civilization requires it.

Again, that old cry of the loss of personal liberty is put forth. Oh, how often has that been raised. Our old friend Cain raised this same question when he said, "Am I my brother's keeper?" This is raised by everyone who is prevented, by this sort of legislation, from doing something he desires to do, presumably upon the theory that the law guarantees to every man the right to do just what he pleases, and when and where. Does any one live solely unto himself? So long as people live in communities, they will be dependent upon each other for nearly everything. It was supposed that all good citizens had long ago discarded that idea, and that the general welfare of the majority of the people was to be the criterion.

The author attempts to show us these fundamental errors in our anti-liquor laws. He states: "There have been two leading errors which, *ab initio*, discredit or vitiate the great bulk of our anti-liquor legislation. The one is the assumption that all people, the temperate as well as the intemperate, must be legislated into sobriety at any cost. . . ." Isn't this the same old cry that has been raised every time a new law is passed, which affects the conduct or general welfare of the people? Does not the druggist object to certain restrictions imposed, the moving picture man to the censorship, the autoist to the speed limit, and the builder to the building restrictions? Laws are not passed with the idea that people can be legislated into being good, but, nevertheless, laws of this character are necessary for the protection and general welfare of the people.

The other error the author points out is "that confiscation without just compensation is conducive to public welfare, health, safety, and good order." The author has himself fallen into two very serious errors. The first is that the law does not, and never did, guarantee to anyone that any particular business or occupation would never be regulated, or perhaps prohibited, even though the general welfare of the people might require it. Inasmuch as I have touched upon this phase of the question in a former paragraph, I will not again discuss this. Suffice it to say that, as

time goes on, the number of businesses and occupations which require regulating, and even prohibiting, is constantly increasing, and will continue to do so as our civilization becomes more complex.

The other error is that the author forgets that, as stated by Mr. Justice Field, in *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, "There is no inherent right in a citizen to sell intoxicating liquors by retail; it is not a privilege to a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of the regulation rest in the discretion of the governing authority." And the confiscation the author complains of is on the same order as the confiscation of moving picture films, gambling paraphernalia, opium, tainted and damaged foodstuffs, patent medicines and many other things, which are destroyed for the general health and welfare of the people generally.

Finally, the author says: "In brief, the Church and its members are interfering not only with men's moral claims, but with their legal rights." What legal rights? The right to do just as you please, and when and where? Moreover, without the assistance of our best citizens, these measures could not have been passed.

In closing, I cannot help but add that I challenge the author to disprove the statement made by Mr. Justice Field, in *Crowley v. Christensen*, supra: "The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than any other source."

JOHN PAUL LEE.

Eaton, Colo.

Why Not An International Sullivan Law?

EDITOR CASE AND COMMENT:

In this state we have an act known as the Sullivan law. It makes it a crime to own and carry concealed weapons. The act was passed because experience taught us that mere laws penalizing murder were insufficient protection to the community, so long as excitable human beings were entrusted with the means to do such injuries.

In a larger way, does not human experience show that nations cannot safely be entrusted with the tools of war? The present frightful conflict could never have been if the nations involved had not had a reasonably adequate military equipment. They could not have fought without guns and soldiers. It seems to be a case where the sight of means to do ill deeds, made ill deeds done.

It ought not to be difficult to persuade lawyers, at least, that a reasonably satisfactory remedy can be devised to promote international peace and justice. It needs no argument to show that disputes may be settled more justly

by reason than by force. The civilized world, everywhere, for centuries has had judicial systems for the adjustment of private disputes. Their decrees have been enforced by the might of the state. One does not need to show that such disputes are always correctly decided. Indeed, we all know that sometimes they are not; yet no thoughtful person would go back to the settlement of private controversies by combat of the disputants, or by any of the numerous ordeals of chance, once in vogue, because it is universally recognized that on the whole the greatest justice is secured by a judicial inquiry.

At the same time, such systems have promoted the peace and good order of society, and without them civilization could not have progressed. Let an international tribunal—a United States of the World—be organized by mutual agreement of the leading civilized nations, *which alone shall have control of the means of war*, and which shall be empowered to settle all disputes of its constituent members, and enforce its decrees, and whose duty it shall be to protect its several units from all aggression. Once organized it is doubtful if any large or dangerous nation would or could for any great length of time continue the expensive war taxes necessary to maintain itself on the outside. The perceived utility of such an arrangement would soon make it practically universal.

The difficulty with most peace proposals has been that they have left the several nations in constant fear of each other's armaments. It has thus seemed necessary to maintain large military equipments. It is only to be expected that large bodies of men trained to war, and living and thinking such an atmosphere, will tend to bring war about. Their very presence and preparedness tends to promote and very greatly intensify war, even though it may at times delay a formal declaration.

Let there be no misunderstanding of this argument. It is not intended to urge any such action by one nation alone. The two great lessons that seem to stand out most clearly from this war are that perfection of preparation for war on the one hand will not avert it, and, on the other hand, that no one nation can safely do without a reasonable preparation against an unexpected and sudden attack from outside. Suppose that England, Germany, France, Russia, Japan, Austria, Italy, and the United States could be induced to unite in the manner indicated. Suppose the combined navies of these countries and a standing army should be placed at the disposal of such a federation, who would dare attack it from the outside? Who from the inside would dare defy its decrees?

Such a remedy still bases peace upon force. It may for that reason be subjected to some criticism. But it is doubted if any other practical basis can be suggested. In any event, it reduces the number of probable fighting units, and is a step forward. A war between New York and Ohio is practically impossible. The Civil War, which was between combina-

tions of states, would probably never have come had there not been a debatable ambiguity in the terms of the original federation.

It is highly probable that the weightiest objection to this proposal is the difficulty of bringing it about. Each nation must voluntarily surrender what has been regarded as the prerogative of a sovereign state. But if that be the only objection, let no one urge it. The endless misery on all sides entailed by this war ought to excite an unquenchable will to save future generations similar sufferings. We who are not directly involved should read the lesson clearly, and mightily resolve to prevent its repetition, to the end that our children and our children's children for all time to come may devote their sole energies to construction,—not destruction; to human comfort,—not to inhuman miseries; and to promote human welfare throughout all the world.

This war is not the fault of any one nation. It is the fault of all nations who adhere to the barbaric system of settlement of international differences by international war. If the organized governments cannot be induced to provide some such guaranty of peace, then the appeal must be carried to the people directly, and the governments forced to some adequate action from the inside. When the demand comes from the people themselves, in sufficient voice, it will be heeded everywhere.

The opportunity to promote such a movement is peculiarly a lawyer's duty. He should be willing to lead in all movements having for their aim the establishment of justice and the promotion of peace and good order. It is the cause of law and order against anarchy and disorder. Our Bar Associations ought to take up the cause. Our legal publications ought to plead it. Our great body of lawyers ought to urge it. The united efforts of all the lawyers throughout the world could not fail soon to make a profound impression, and the rule of reason would be rapidly substituted for this barbaric appeal to force.

Rochester, N. Y.

NELSON E. SPENCER.

Portia As An Exemplar

EDITOR CASE AND COMMENT:

Without intending to say a word other than in praise of your excellent October issue inably misused a myriad of times by spouters observation that Shakespeare's Portia (not Brutus's) seems to be a poor exemplar or namesake to be selected by lawyers of the female sex. The Portia who figured in the case of Shylock v. Antonio, action of covenant on bond, reported in Merchant of Venice, with all due respect to her, was an arrant humbug, and doubly so. Not only was she masquerading as a man, but she was not a lawyer at all. The wisdom and learning (or perhaps legal chicanery), which she aired in court, were not her own, but carefully instilled into her for that one occasion by one Dr. Bellario, a mere man, employed for that purpose. For aught that appears, he would have done as well, or better, in person; and her only motives in persuading, or paying him to let her take his place, were the not very

lofty ones of spying, and also playing a trick, on her newly acquired husband. We readily forgive her, because she thereby made possible some delightful comedy, with exquisite touches of pathos; but this does not make her an ideal of a woman lawyer, outside of the playhouse.

Moreover, she did not even appear as a lawyer, in the sense commonly understood; that is, as an advocate or attorney for one of the parties litigant. She simulated a judge, or deputy judge; that is to say, a juriconsult employed as a judge. As such, she is no more worthy, for she pretended to be impartial, while really in the interest of one of the parties, and accepted a fee for deciding in his favor. The silly stage arrangement, in some productions of the play, by which she is made to stand at the counsel table and appear to be making a speech to the court on behalf of Antonio, obscures this fact; but she is called "judge" a score of times, and Shylock urges her to "proceed to judgment," which she does,—with a vengeance.

It is a wonder that this point about Portia is ever overlooked; for to do so spoils the scene, especially to a lawyer. Imagine the absurdity of an advocate coming into court and asking to have his own client pointed out to him,—“which is the merchant here and which the Jew?” That inquiry is entirely in character for a judge, calling the parties before him. The celebrated praise of mercy, abominably misused a myriad of times by spouters before juries, loses its force when supposed to be uttered by an advocate. Imagine counsel for the defendant, in a civil case, as a serious argument, sobfully begging the plaintiff, in open court, not to take judgment! As a solemn admonition from the bench, to an over-eager and rapacious plaintiff, it is appropriate and beautiful, and has parallels in many an actual trial.

In fact the “cutest” feature of this scene is the assumption throughout, by Portia, of the exact manner and style, not of a barrister, but of a judge. The request to hand up the document in controversy,—the glance over the top of it (as we may imagine), midway in the reading of it, with the significant interjection, “Shylock, there's thrice thy money offered thee,”—the exclamation at the end, “Why, this bond is forfeit!”—the precise and minute directions about the form of the judgment and the levy of the *fi. fa.*,—and then, as some lawyers in real life have experienced with a sickening feeling, the heaping of conditions upon the judgment, by the court, under every possible kind of counterclaim, recoupment, and set-off, until a seeming victory for the plaintiff crumbles away into direst defeat,—all these must have been most closely and humorously studied by Shakespeare, in court, to have been so exactly reproduced.

This Portia, therefore, is as much of a misfit for the type of an ideal woman lawyer, as, in the opposite direction, the modest Jeanne d'Arc, who wanted only to go back to her quiet peasant life, is as a type for the shrieking suffragette.

W. A. DENNIS.

Washington, D. C.



Among the New Decisions

We are firm believers in the maxim that for all right judgment of any man or thing it is useful nay, essential, to see his good qualities before pronouncing on his bad.—Carlyle.

Appeal — shortening time — validity. That an amendatory act, shortening the time for appeals from one year to six months, will not, in the absence of express provisions to the contrary, apply to judgments rendered prior to the taking effect of the new act further than to limit the right of appeal to not more than six months after the taking effect of such new act in such cases as still had a right of appeal under the old law, is held in *Wilson v. Kryger*, 26 N. D. 77, 143 N. W. 764, annotated in 51 L.R.A.(N.S.) 760.

Assault — liability of aider. If one present at a quarrel encourages a battery, he is held in the Oklahoma case of *Perrine v. Hanacek*, 40 Okla. 359, 138 Pac. 148, annotated in 51 L.R.A.(N.S.) 718, to assume the consequences of the act to its full extent, as much as the party who does the beating.

Assault — self-defense — forcing person from sidewalk. That one under the influence of liquor who, while on the sidewalk, has applied insulting epithets to the owner of abutting property, has the right of self-defense if the latter advances upon him to force him to leave the walk, is held in *Hixson v. Slocum*, 156 Ky. 487, 161 S. W. 522, annotated in 51 L.R.A.(N.S.) 838.

Broker — right to employ assistant. A

real estate agent employed by a nonresident to sell land located in the state of the agent's resident, who assumes authority to grant options on the property, is held in *Sorenson v. Smith*, 65 Or. 78, 129 Pac. 757, 131 Pac. 1022, 51 L.R.A.(N.S.) 612, to have no power to employ an assistant at the expense of his principal.

Carrier — duty of passenger on platform. A passenger on a railroad train who leaves the train at an intermediate station for a temporary purpose is held bound, in *Wetherla v. Missouri P. R. Co.* 90 Kan. 702, 136 Pac. 221, annotated in 51 L.R.A.(N.S.) 899, in the exercise of ordinary care in crossing the station platform, to look upon the platform to avoid collision with any object usually or necessarily thereon, which may impede his progress and do him injury; if without any sufficient reason he neglects so to do, and he receives injury by coming in contact with an obstruction, he is guilty of contributory negligence and cannot recover damages from the railroad company for the injury.

Carrier — entering car to transact business — trespasser. A person who enters a passenger train at a station, without ticket or money to pay fare, for the purpose of collecting an account from a passenger on such train, and remains on the train after it leaves such station, is held not a

passenger in the Oklahoma case of Chicago, R. I. & P. R. Co. v. Evans, 138 Pac. 804, 51 L.R.A.(N.S.) 608, and the company, through its servants and employees, may eject him from the train at a proper place for failure to produce a ticket, or to pay fare, or on account of boisterous conduct, and the company is not liable for injury resulting to such passenger when only such force is used as is reasonably necessary to eject him under the circumstances.

Carriers — duty to control crowd at station. A railroad company which makes no effort to control the pushing and surging of the crowd attempting to board its cars which is customary at a particular station is held liable in the Massachusetts case of Collins v. Boston Elev. R. Co. 217 Mass. 420, 105 N. E. 353, 51 L.R.A.(N.S.) 1154, for injury to an intending passenger by being crowded between a standing car and the station platform.

Carriers — sudden stopping of trains — liability. Stopping a railroad train so suddenly and violently as to throw passengers forward in their seats and cause baggage to fall from the racks is held in the Connecticut case of Rosenthal v. New York, N. H. & H. R. Co. 88 Conn. 65, 89 Atl. 888, 51 L.R.A.(N.S.) 775, to be evidence of negligence which the carrier must negative to avoid liability for injury caused by the falling baggage.

Charities — negligence — liability to stranger. A hospital conducted as a public charity is held liable, in the Virginia case of Hospital of St. Vincent of Paul v. Thompson, 81 S. E. 13, 51 L.R.A.(N.S.) 1025, for negligent injuries to one who accompanied to its building an intending patient for the purpose of rendering necessary assistance to him, as such person is not a beneficiary of the charity.

Contract — to institute recall election — validity. The first adjudication to pass upon the legality of a contract to procure the recall of an officer is the Washington case of Stirtan v. Blethen, 139 Pac. 618, 51 L.R.A.(N.S.) 623, which

holds that a contract employing an agent to institute and carry out a movement for a recall election against certain officers, without disclosing the true motives and real parties behind the movement, and undertaking to pay necessary expenses therefor, is contrary to public policy and void.

Constitutional law — limiting hours of labor — laundry. Forbidding labor in a public laundry from 6 P. M. to 7 A. M. is held not an unconstitutional interference with liberty or property rights, in the California case of Ex parte Wong Wing, 138 Pac. 695, accompanied in 51 L.R.A.(N.S.) 361, with the recent cases on the subject.

Constitutional law — minimum wage for public improvements — right of taxpayer. That no constitutional rights of the taxpayer are infringed by requiring a payment of a minimum wage for work done on public improvements the cost of which is to be paid by special assessment, in excess of the prevailing wage for similar labor at the time and place when and where the improvement is made, although it results in an increase in the cost of the improvement and the rate of assessment, is held in the Washington case of Malette v. Spokane, 77 Wash. 205, 137 Pac. 496, annotated in 51 L.R.A.(N.S.) 686.

Covenant — against encumbrances — sewer easement. An unusual question was presented in the Iowa case of First Unitarian Soc. v. Citizens' Sav. & T. Co. 142 N. W. 87, 51 L.R.A.(N.S.) 428, which holds that an easement for a public sewer laid 5 feet beneath the surface of a city lot is not within a covenant against encumbrances in a deed of the property.

The conclusion reached in this case, while in keeping with the Iowa rule as to public highways, cannot be reconciled with the great weight of authority upon the question. The majority of the court seemingly proceeded upon the ground that since the drain was a public necessity it must be a benefit to the property, and that therefore the owner was subject to some incidental servitude; but this in itself seems inconsistent with the fact

that the property by statute could not have been taken for the purpose without condemnation and payment of damages.

Criminal law — excessive sentence — effect. That a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and the offense, and only void as to the excess, when such excess is separable and may be dealt with without disturbing the valid portion of the sentence, is held in the New Mexico case of *Re Cica*, 137 Pac. 598, which is accompanied in 51 L.R.A.(N.S.) 373, by a note on the effect of an excessive sentence.

Divorce — collusion — vacating. That a decree of divorce secured by collusion will not be vacated at the instance of petitioner, in the absence of duress, is held in the Washington case of *Robinson v. Robinson*, 77 Wash. 663, 138 Pac. 288, annotated with recent cases in 51 L.R.A.(N.S.) 534, the earlier decisions having been presented in 60 L.R.A. 294.

Divorce — cruelty — failure to entertain wife. Is the failure of a husband to entertain his wife or the fact that he is unsociable, a ground for divorce? This question was considered in the Michigan case of *Bowen v. Bowen*, 146 N. W. 271, annotated in 51 L.R.A.(N.S.) 460, which holds that a divorce will not be granted for nonsupport or extreme cruelty, because an out-door laborer earning \$35 a month consumes a portion of it for liquor and cigars, paying only the grocery, meat, and coal bills, and when he reaches home after his work prefers to read or go to bed rather than to talk to his wife, or take her out to entertainments or to visit friends.

Eminent domain — right to exercise power for another's benefit. Where the right to exercise the power of eminent domain has been conferred only on corporations, a corporation is held in *State ex rel. Springfield Invest. Co. v. Superior Ct.* 78 Wash. 679, 139 Pac. 601, 51 L.R.A.(N.S.) 987, to have no power to exercise the right to secure property to be conveyed to an individual although he intends to use it for a public purpose.

Evidence — diary entries — admissibility. Entries of temperature in a diary kept by an individual since deceased, not a part of any employment or duty, are held not admissible in evidence in the Maine case of *Arnold v. Hussey*, 111 Me. 224, 88 Atl. 724, 51 L.R.A.(N.S.) 813, in an action between strangers to recover damages for injuries caused by a fall upon a ridge of ice on the sidewalk.

Evidence — opinion — condition of bridge. A bridge where a brakeman lost his life was so described and photographed that the jury could thoroughly understand its character and condition. Railway employees were permitted, over objection, to give their opinions as to such bridge being a safe place to work. This was held error in *Duncan v. Atchison, T. & S. F. R. Co.* 86 Kan. 112, 119 Pac. 356, as the jury could not from such opinions have received any assistance in arriving at a proper conclusion. But it was further determined that opinions of railway employees as to which side of a freight train it was proper for a brakeman to alight in order to give signals were properly received; this being a question calling for special knowledge or experience. The admissibility of opinion evidence as to safety of place or appliance is treated in the note appended to the foregoing decision in 51 L.R.A.(N.S.) 565.

Evidence — X-ray photograph. To render an X-ray photograph admissible in evidence, it is held in *Ligon v. Allen*, 157 Ky. 101, 162 S. W. 536, that its accuracy must be established. The case law on use of photographs as evidence is collected in the note appended to the foregoing decision in 51 L.R.A.(N.S.) 842.

Extradition — fugitive — purpose of departure. To be a fugitive from justice under the laws of the United States, it is held not necessary, in the Oklahoma case of *Ex parte Williams*, 136 Pac. 597, that the person charged with having left the state in which the crime was alleged to have been committed should have done so for the purpose of avoiding prosecution anticipated or begun, but simply that, having committed a crime within the

state, he leaves such state, and, when he is sought to be subjected to its criminal process to answer for his offense, he is found within the territory of another state. The later cases on the subject are gathered in the note appended to the foregoing decision in 51 L.R.A.(N.S.) 668, the earlier authorities having been presented in 28 L.R.A. 289.

Fraud — introducing impostor to broker — liability for loss. An unusual question was presented in the Washington case of *Raser v. Moomaw*, 78 Wash. 653, 139 Pac. 622, 51 L.R.A.(N.S.) 707, which holds that one who, with knowledge of the fraud, introduces to a money broker without knowledge of or means of knowing the facts, a person impersonating the owner of real estate, stating that he desires to borrow money on the property, and thereby enables him to secure a loan which cannot be recovered because the borrower is an impostor and insolvent, is liable to make good the loss resulting to the broker from the transaction.

Gas — rate — manufacturers. The first case to pass directly upon the question as to who is a manufacturer within the meaning of an ordinance or contract regulating the rates of public service corporations, seems to be the Louisiana decision of *Henderson v. Shreveport Gas, E. L. & P. Co.* 63 So. 616, 51 L.R.A.(N.S.) 448, which holds that a person who owns and conducts an automobile garage in which he uses a gas engine for the purpose of generating an electric current to supply light for a large building in which he carries on his business, to charge electric automobiles and storage batteries, to run lathes and emery wheels, to make parts for cars, to put other parts of automobiles into good condition, to grind valves of cars, and do other work in that connection, will be placed in the class denominated "manufacturers," rather than in either of the classes denominated "domestic consumption" or "for public institutions," and be held obligated to pay the rate fixed for "manufacturers."

Highway — negligent driving of automobile — forcing other car off from road.

There seems to be little authority upon the question of liability for injuries resulting from crowding an automobile off the road. The Michigan case of *Granger v. Farrant*, 146 N. W. 218, 51 L.R.A.(N.S.) 453, holds that the driver of an automobile who overtakes and passes another car at such speed, and returns to the right side of the road so close to it as to disconcert its driver by striking the car and causing it to swerve over the embankment, is liable for the injury thereby inflicted upon the occupants of the car, although the blow was not sufficient to propel the car over the embankment.

Homicide — concurrent cause of death — effect. On a trial for homicide where the evidence tends to show a mortal wound by defendant, and a subsequently self-inflicted wound by deceased, which may or may not have been mortal, it is held error, in the West Virginia case of *State v. Angelina*, 80 S. E. 141, annotated in 51 L.R.A.(N.S.) 877, to tell the jury in instructions propounded by the state, either (1) that defendant, who inflicted the first mortal wound, is guilty of first-degree murder, notwithstanding the subsequently self-inflicted wound by deceased may have accelerated or been the immediate cause of his death; or (2) that defendant should be found so guilty, if upon the evidence the jury should find beyond a reasonable doubt, that deceased would have died from other causes, or would not have died from the wound inflicted by defendant had not other causes operated with it.

Instructions so limited ignore the well-established rules of homicide (a) that if, after a mortal wound is inflicted by one person, another independent responsible agent in no way connected in causal relation with the first intervenes, and wrongfully inflicts another injury, the proximate cause of the homicide, the latter, and not the former, is guilty of murder; and (b) that if such intervening responsible agent wrongfully accelerates death, he, and not the agent first to wound, is guilty of the homicide.

Incompetent persons — right to dismiss writ of inquiry. That a statutory pro-

ceeding in the nature of the writ inquiring de lunatico cannot be dismissed by the petitioner without the consent of the court acting in its discretion for the interests of the public and of the person whose sanity is questioned, is held in the Missouri case of *State ex rel. Paxton v. Guinotte*, 165 S. W. 718, 51 L.R.A. (N.S.) 1191.

Injunction — against violation of penal statute — violation — contempt. That a court of equity has no jurisdiction to include in a divorce decree an injunction against remarriage within a specified time, which is by statute made a penal offense, so that violation of it can be punished as a contempt, is held in *People v. Prouty*, 262 Ill. 218, 104 N. E. 387, 51 L.R.A. (N.S.) 1140.

Injunction — boycott by labor organization — vender of materials. There is a conflict of opinion among the courts as to the right of members of a labor union to agree not to handle the product of an employer of labor, without reference to whether the purpose or end sought thereby to be attained is justifiable. That members of a labor union may be enjoined from refusing to handle materials sold by one who furnishes supplies to an employer of nonunion labor, if they have no dispute with their employers who purchase such materials, is held in the Massachusetts case of *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841, annotated in 51 L.R.A. (N.S.) 778.

Injunction — dissolution — prior violation — effect. A final decree is held in the New Mexico case of *Canavan v. Canavan*, 139 Pac. 154, annotated in 51 L.R.A. (N.S.) 972, to dissolve a preliminary injunction which is ancillary to the main case, unless the same is specially continued by the decree, and thereafter a litigant cannot be punished as for a civil contempt for violation of the preliminary injunction prior to its dissolution.

Insurance — automobile — obligation to defend criminal prosecution. A policy of automobile insurance obligating the insurer to indemnify the assured against

loss from the liability imposed by law upon him for damages on account of bodily injuries, including death, accidentally sustained by any person by reason of the maintenance or use of his automobile, and to defend in the name and on behalf of the assured any suits which may at any time be brought against him on account of such injuries, is held in the Michigan case of *Patterson v. Standard Acci. Ins. Co.* 144 N. W. 491, not to bind the insurer to defend a criminal prosecution for manslaughter instituted against the assured. Recent cases on the subject accompany the foregoing decision in 51 L.R.A. (N.S.) 583, the earlier authorities having been presented in 44 L.R.A. (N.S.) 70.

Insurance — exemption — locomotive engine. A clause in a fire insurance policy exempting the insurer from loss by fire from or occasioned by locomotive engines is held in *Montgomery v. Southern Mut. Ins. Co.* 242 Pa. 86, 88 Atl. 924, 51 L.R.A. (N.S.) 518, not to exempt from loss from fire communicated by buildings burning on the railroad right of way which were ignited by the sparks from a locomotive engine.

Intoxicating liquors — taking orders for foreign dealer — liability. Where a liquor house situated in another state has a representative in a town in Oklahoma, who receives orders for whisky, and writes letters to the house, directing that whisky be sent to persons who give such agent orders, and the whisky is sent to such persons, and the bill is sent to the agent of the house, to collect payment for the same, it is held in *Landrum v. State*, 9 Okla. Crim. Rep. 599, 132 Pac. 830, 51 L.R.A. (N.S.) 607, that this in law constitutes a sale of intoxicating liquors in Oklahoma, and such agent is liable to prosecution and conviction for violating the prohibitory law of the state.

Jury — constitutional rights — granting new trial. A question on which there is comparatively little authority was considered in the Missouri case of *Devine v. St. Louis*, 165 S. W. 1014, annotated in 51 L.R.A. (N.S.) 860, which holds that the constitutional right to trial by jury is not infringed by the granting by the

court of a new trial for the award of excessive damages by the jury.

Libel — house or occupants. A written statement that a particular house has a bad reputation with the police is held a libel on its occupants in the Alabama case of *Fitzpatrick v. Age-Herald Pub. Co.* 63 So. 980, 51 L.R.A.(N.S.) 401. It is further determined in this case that the fact that the house is not designated in a statement that a shooting occurred on a named street between two other streets, in a house which bore a bad reputation with the police, does not prevent it from being a libel on the occupants if those familiar with the facts know which house was referred to.

Limitation of actions — judgment — suspension — absence from state. Notwithstanding a debtor's departure from and residence out of the state, after a judgment has been recovered against him, may not obstruct the creditor in the enforcement of his lien, it is held in the West Virginia case of *Lamon v. Gold*, 79 S. E. 728, annotated in 51 L.R.A.(N.S.) 883, that it will suspend the running of the statute and preserve the lien of the judgment.

Master and servant — assault on customer — liability. A merchant is held not liable in *Matsuda v. Hammond*, 77 Wash. 120, 137 Pac. 328, annotated in 51 L.R.A.(N.S.) 920, for the act of his general manager authorized to collect for goods sold, or settle for goods taken wrongfully, in assaulting a customer to whom he has gone to collect for goods which he claims were taken by the customer, contrary to the contention of the latter, unless he ratifies the act or retained the manager in his employ with knowledge that he was likely to commit it.

Master and servant — contract of employment — duration. The recent cases on this subject do not show such a conflict as appears in the earlier ones. The tendency is apparently toward the rule that a hiring at so much per year, month, or week is, in absence of other circumstances controlling its duration, an in-

definite hiring only, terminable at the will of either party. The West Virginia case of *Reasnor v. Watts, R. & Co.* 80 S. E. 839, annotated in 51 L.R.A.(N.S.) 629, holds that an employment upon a monthly or annual salary, if no definite period is otherwise stated or proved for its continuance, is presumed to be a hiring at will, which either party may at any time determine at his pleasure without liability for breach of contract.

Master and servant — injury by automobile in possession of repairer — liability of owner. One who turns his automobile over to the keeper of a garage to put it in repair for selling, the owner to pay for labor and storage and the garage keeper to have a commission if he sells the machine for a satisfactory price, is held not liable in the California case of *Segler v. Callister*, 139 Pac. 819, annotated in 51 L.R.A.(N.S.) 772, for injury inflicted by the latter while running the machine on the road to test it.

Master and servant — joint service — liability of either master. That the joint agent of two railroad companies at a particular station was performing a service for one of them when he inflicted an injury upon a bystander is held in *Moore v. Southern R. Co.* 165 N. C. 439, 81 S. E. 603, annotated in 51 L.R.A.(N.S.) 866, not to relieve the other from liability for his acts.

Master and servant — permitting passenger to drive. The fact that a servant, driving his master's car upon the master's business, permits a stranger riding with him to drive it temporarily, while upon such business, is held in *Kayser v. Van Nest*, 125 Minn. 277, 146 N. W. 1091, 51 L.R.A.(N.S.) 970, not to absolve the master from responsibility.

Monopoly — contract to fix price of commodity — validity. A contract by the manufacturer of a particular brand of flour sold in a certain market, with retailers, as ancillary to his wholesaling the product to them, that they will maintain a minimum price, is held valid in the Washington case of *Fisher Flouring Mills Co. v. Swanson*, 137 Pac. 144, if it

is necessary to the continued production of his product, involves less than a controlling part of that commodity in the market, and the price fixed is fairly necessary to his protection, and affords only a fair profit to the contracting parties.

This decision is accompanied in 51 L.R.A.(N.S.) 522, by the recent cases on the validity of a contract provision seeking to control the price at which an article shall be resold, the earlier authorities having been gathered in a note in 27 L.R.A.(N.S.) 395.

Municipal corporation — employment of agent — form of contract. It is determined in the West Virginia case of *Charleston v. Littlepage*, 80 S. E. 131, 51 L.R.A.(N.S.) 353, that the employment of an agent or attorney to perform a special service for a municipal corporation need not, in the absence of a statute requiring it, be evidenced by a formal ordinance, by-law, or resolution, nor is it essential that it be in writing.

Municipal corporation — liability for tort of police officer. The liability of a municipality for failure to require a bond of an officer seems to have been considered for the first time in the Iowa case of *Looney v. Sioux City*, 145 N. W. 287, 51 L.R.A.(N.S.) 546, which holds that the failure of a superintendent of police to take the bond from a police officer authorized by ordinance, before permitting him to exercise the duties of his office, does not render the municipality liable for a tort committed by such officer in the performance of his duty, since it is in the exercise of a governmental function.

Municipal corporation — power of legislature to establish commission government. The state Constitution expressly confers upon the legislature authority to prescribe the powers of a municipality, and to alter or amend the same at any time; and a statutory enactment which in effect is that, upon stated affirmative favorable action taken by the city council and the electors of a municipality, and the due election of commissioners, a commission form of government for the municipality "shall become operative," is held not unconstitutional, in the Florida

case of *Munn v. Finger*, 64 So. 271, and such enactment is not void for uncertainty, since the intent is that the designated commissioners shall exercise the authority theretofore vested in the mayor and city council, the only elective officers under the charter acts. The recent cases are appended to the foregoing decision in 51 L.R.A.(N.S.) 632, the earlier authorities having been collected in 35 L.R.A.(N.S.) 802, and 41 L.R.A.(N.S.) 111.

Municipal corporation — power to prohibit use of tobacco. The police power of a city is held in *Zion v. Behrens*, 262 Ill. 510, 104 N. E. 836, not to extend to the prohibition of smoking or carrying lighted tobacco in its streets and parks, which are spacious enough so that the use of tobacco in such places cannot be harmful to others, or tend to cause danger to property from fire.

The cases relating to the power to prohibit or restrict the use of tobacco accompany this decision in 51 L.R.A.(N.S.) 562.

Municipal corporation — requiring license for sale of cider. Charter authority to regulate any trade of a tendency dangerous to morals, health, or safety, and to prevent nuisances and declare what are such, is held in the Arkansas case of *Texarkana v. Hudgins Produce Co.* 164 S. W. 736, 51 L.R.A.(N.S.) 1035, to include power to require persons engaged in the sale of cider to procure a license.

Nuisance — operation of railroad — railroad yards. The smoke, noise, and disturbance which ordinarily attend the proper operation of a railroad at and between stations is held not a private nuisance to adjacent property affected thereby, in *Matthias v. Minneapolis, St. P. & S. Ste. M. R. Co.* 125 Minn. 224, 146 N. W. 353, 51 L.R.A.(N.S.) 1017.

But as to such incidental railway facilities as shops, roundhouses, and switch yards, the location and operation of which is not determined by public convenience or necessity, the railroad is liable, if thereby a nuisance is imposed upon an adjacent landowner, even though the location of the facility be proper and the operation thereof duly careful.

Pleading — conversion — alternative allegations. In an action for conversion of personal property, an allegation in the alternative that one or the other of two defendants converted the goods, but which one plaintiff is unable to determine, is held in *Casey Pure Milk Co. v. Booth Fisheries Co.* 124 Minn. 117, 144 N. W. 450, annotated in 51 L.R.A.(N.S.) 640, to state no cause of action against either defendant.

Railroads — signals — statutory duty upon backing into station. The statutes governing the duty of railroad companies to keep lookouts ahead and to give signals and stop trains upon the appearance of a person on the track are held in the Tennessee case of *King v. Tennessee C. R. Co.* 164 S. W. 1181, 51 L.R.A.(N.S.) 618, not to apply in case of the backing of a train into a station which it has run past a short distance before coming to a stop.

Rape — civil liability — effect of consent. Consent by a child under the age of consent is held no bar to civil liability for rape in the Oregon case of *Hough v. Idershoff*, 139 Pac. 931, annotated in 51 L.R.A.(N.S.) 982, where the statute defines criminal knowledge of a child under such age as rape the same as forcible knowledge of one over such age.

School — expulsion of pupil — retention of tuition. A private school the catalogue of which makes the tuition payable in advance, and provides that pupils may be expelled for breach of discipline, is held entitled, in *Teeter v. Horner Military School*, 165 N. C. 564, 81 S. E. 767, annotated in 51 L.R.A.(N.S.) 975, upon expelling a pupil for breach of reasonable regulations, not only retain the tuition actually paid, but compel payment of the portion due and not paid when the expulsion occurred.

Specific performance — of stock pooling contract. That specific performance will not be granted of an agreement between holders of stock in a corporation to vote it in block as directed by a majority of the contractors, even though the agreement is valid, but that the parties will be left to their remedy at law for a breach, is held in the Washington case of *Gleason v. Earles*, 78 Wash. 491, 139 Pac. 213, annotated in 51 L.R.A.(N.S.) 785.

Statute of frauds — sale of stock not yet issued. A contract for the sale of corporate stock thereafter to be issued is held one for the sale of goods, wares, and merchandise, within the meaning of the statute of frauds, in the Washington case of *Hewson v. Peterman Mfg. Co.* 136 Pac. 1158, which is accompanied in 51 L.R.A.(N.S.) 398, with the recent cases on the subject.

Tax — inheritance — devise to nonresident charity. That an exception of property conveyed for some educational, charitable, or religious purpose exclusively, in a statute imposing an inheritance tax upon property in the state which shall pass by will or the intestate laws, does not extend to property conveyed to charitable institutions located in other states, is held in the Missouri case of *Re Quirk*, 165 S. W. 1062, which is accompanied in 51 L.R.A.(N.S.) 817, by the recent cases, the earlier decisions having been presented in 17 L.R.A.(N.S.) 733.

Trover — mistake as to value of property — effect on liability. That a purchaser of property who, upon taking possession, disposed of barrels of a tenant found on the premises, thought they were mere rubbish, is held in the California case of *Poggi v. Scott*, 139 Pac. 815, 51 L.R.A.(N.S.) 925, not to relieve him from liability for the full amount of loss in case they were in fact filled with valuable material.





Each change of many-colour'd life he drew.—Johnson.

Humors of German Courts. In Berlin not long ago an ironworker was sent to prison because he had laughed at a policeman. It appears that, as this man was proceeding along a street one day, his risibilities were aroused by the sight of a particularly stout policeman giving chase to a dog. The offender was promptly haled into court, and "sent up" for "scandal."

A German, in attempting to board a moving train, fractured his leg. After six months in a hospital, he was discharged; whereupon the State Railway Department at once prosecuted him for "infringement of regulations." He was fined a sum equivalent to \$5.

Upon entering an omnibus a man trod on the foot of a woman, who was so incensed by the incident that she remarked that he walked like a hen. For this term of reproach the lady was fined 20 marks.

Claire Waldoff, the Berlin singer, once cleverly outwitted the police. She had been warned that if she sang any of her songs on Easter Sunday there would be trouble. But announcement was, nevertheless, made that Claire Waldoff was positively to appear. She did so,—so did the police; and she sang the German National Anthem. The promised prosecution did not take place.—The Green Bag.

Cotton Day. The three dignified judges of the Mississippi supreme court sat on the bench on October 26, clad in blue overalls, hickory shirts, and jumpers, with cotton handkerchiefs around their necks; and perhaps for the first time in the history of the United States,

justices so attired have handed down decisions.

The judges wished to show that they were heart and soul imbued with the spirit of "cotton day," and felt that by wearing overalls and jumpers made of cotton they would assist in emphasizing the importance of the great "wear cotton clothes" movement in the South.

Assistant Attorney General Hetridge also appeared in overalls in the supreme court chamber, and made oral arguments before the justices.

When Justices Smith, Cook, and Reed entered the court room, attired in their overalls and jumpers, many attorneys left the court room for department stores to buy suits of the same materials.

What a Shock! The discovery of a well-developed mouse in a bottle of beer has driven a Worcester (Mass.) man aboard the water wagon.

He is also so "peevish" at the brewing company which bottled the amber fluid that he has decided to bring suit for damages on account of the shock to his feelings at finding the rodent in his drink.

This recalls the case of Jackson Coca-Cola Bottling Co. v. Chapman, — Mass. —, 64 So. 791, where the court says: "A 'sma' mousie' caused the trouble in this case. The 'wee, sleekit, cow'rin' tim'rous beastie' drowned in a bottle of coca-cola. How it happened is not told.

"There is evidence for appellant that its system for cleansing and filling bottles is complete, and that there is watchfulness to prevent the introduction of foreign substances. Nevertheless the little

creature was in the bottle. It had been there long enough to be swollen and undergoing decomposition when the bottle was purchased from a grocer and opened by appellee. Its presence in the bottle was not discovered until appellee had taken several swallows. An odor led to the discovery. Further events need not be detailed. Appellee says he got sick. Suffice it to say he did not get joy from the anticipated refreshing drink. He was in the frame of mind to approve the poet's words:

'The best-laid schemes o' mice and men
Gang aft aglay
An'lea'e us nought but grief an' pain
For promis'd joy?

"The record discloses sufficient evidence to sustain the jury's verdict for appellee. There is no error for reversal. Appellant company bottled the coca-cola for the retail trade, to be sold to the general public as a beverage refreshing and harmless. The bottle in this case was purchased by the grocer from the appellant."

Sublime but Irrelevant. A cable despatch from Paris to The Sun announces that the attorney for Jacques Lebaudy, formerly Emperor of the Sahara, has asked the courts to postpone the hearing of his suit for 2,500,000 francs (\$500,000), arising from a sale of land, with 2,000,000 francs (\$400,000) damages for an alleged breach of contract.

The lawyer explained his request by saying that Lebaudy, instead of sending him documents which would enable him to proceed with arguments in the case, forwarded him a typewritten copy of Act II. of "Richard III."

When the Cow Came Home. Some time ago when H. H. Riley, then of Constantine, Michigan, was prosecuting attorney, writes Judge J. W. Donovan, a butcher was charged with stealing a cow, and killing her and selling the beef. The proof was circumstantial. The owner of the cow saw a hide hung up in the meat shop, which he recognized as that of his lost animal. The defense had made a strong appeal, and the prosecuting attorney was prepared to make an eloquent argument, when the butcher's

boy rushed into court, all out of breath, saying: "Pa! The cow has come home." There she was, sure enough, standing at the owner's gate and anxious to get into the yard. Find "not guilty" was the court's order to the jury.

How Innocence May Look Like Guilt. It appears that in his early days young Lipton, now Sir Thomas, used to perform very creditably on the violin, and he usually spent the evening playing to a friend who keeps a small shop in the neighborhood. These impromptu concerts took place in the parlor behind the shop after closing hours, and one evening as he was making his way to his friend's place a fire engine raced past him.

He joined in the crowd that followed it, and was horrified to find that his friend's shop was on fire. To add to his dismay, he suddenly remembered that he had left his precious violin in the back parlor the night before. Alarmed for the safety of his instrument, he rushed into the blazing shop and made his way to the place where he knew it would be lying, tucked it under his jacket, and, after a struggle, reached the doorway again.

But no sooner had he reached the street than a burly policeman pounced on him and arrested him on a charge of looting a violin from the shop.

She Liked Sailing. A captain on one of the transatlantic liners tells a curious story illustrating how one may live upon nothing a year without breaking the laws of the land.

It seems that some years ago a steam-packet company of Liverpool wanted to buy a piece of land owned by a "stay-at-home" spinster, as her neighbors called her. She sold her land at a very low price, but insisted that the agreement should have a clause giving her the right at any time during her life to travel with a companion on any of the company's vessels.

When the agreement had been concluded, she sold her furniture and went on board the first outgoing ship. For years this shrewd spinster lived nearly all the time upon one ship or another, frequently accompanied by a companion, according

to agreement. This was always a person who otherwise would have been a regular passenger, but who purchased her ticket at a reduced rate by paying the spinster instead of the company.

The company offered her more than twice the value of her land if she would give up the privilege, but this she would not do. Her reply was, "You got the land cheap, and I like sailing; so we ought both to be satisfied."—N. Y. Evening Post.

Keeping His Hand In. A St. Louis attorney recently made an affecting plea in behalf of a negro, charged with robbery, whom he had been appointed by the court to defend.

"Gentlemen, I appeal to you not to send this man to the penitentiary," said he. "There has not been a scintilla of proof that he is a thief. He has no money and no friends. Why, he is so poor that the court appointed me to defend him so that he would not be deprived of the services of able counsel. I could say more, but the time allotted to me is growing short. I can only tell you that I have sat here beside this prisoner for two days and I believe he is an innocent man."

The lawyer felt in his vest pocket for his gold watch. It was gone.

The prisoner had been taken back to the cage. When he was searched his lawyer's watch was found in his pocket. The jury had retired to deliberate and knew nothing of the discovery.

A Friend of Man. The rich Boston bachelor who died recently, and bequeathed his property to the servants at the hotel where he lived, has added another to the list of unique wills of those that are regarded thus by the world of convention, which expects a man to leave his property to his relatives, and, failing them, to some charitable or philanthropic institution.

This man was Henry K. Barnes, and was called a "lonely old bachelor without kith or kin." But the hotel employees had another vision of the case. To them he was a kind of fairy prince, not merely in the gift of his fortune at death, but throughout the forty years he had lived at the hotel. Not only Christ-

mas gifts and other presents gladdened the lives of the people about him. He had a fashion of sending home young stenographers in taxicabs when the rain or snow was bad. He sent postcards to the hotel servants when he was traveling. And in manifold ways he made friends of those who served him, and no doubt realized an atmosphere of home and affection through this adjustment to his surroundings.

The instance is only one in many that might indicate the needlessness of being rich and lonely and friendless. Many of the old man's kindnesses might have been done by one with little means. He merely did his best to make a place for himself in the hearts of the people about him. And these friends were loyal and devoted. The man's face will be missed from the hotel lobby, his attentions remembered with affectionate gratitude and his fortune will brighten a multitude of homes.—Des Moines Register and Leader.

Human Nature. The condemned murderer was to be hanged at noon. He sat in his cell and read the Bible.

The sheriff appeared and notified the condemned man that his execution was postponed for a month.

The condemned man laid down the Bible and lit a cigarette.—Cincinnati Enquirer.

Famous Lawsuit. Robert Johnson, plaintiff in the famous "Jones County Calf Case," which began in 1874 and continued for twenty years, is dead. He was seventy-seven years old. His demise occurred at the home of his brother's family near Jefferson, Iowa, and was unexpected, says the Savannah Journal.

The death of Mr. Johnson again recalls this famous "Calf Case," some of the principal facts of which are as follows:

Four calves, the market value of which was \$25, were the cause of the greatest lawsuit in the history of American jurisprudence. The litigation started by their sale extended over a period of twenty years, was tried in seven different counties, before one hundred and fourteen jurors, was four times appealed to the

supreme court of the state, entailing fees amounting to \$75,000 for an army of lawyers, and concluded with a final judgment for \$1,000 and court costs, amounting to \$2,886.84.

This litigation—a monument to the cost at which legal redress may be secured by a persistent litigant—is known as the "Jones County Calf Case," from Jones county, Iowa.

A Hard, Hard Law. During the time of Solon, the famous lawmaker, he secured the passage of a statute compelling every able-bodied adult man in the nation to give proof once a year that he was earning a decent living and was self-supporting. Somebody has written to us suggesting that this would not be a bad example for Uncle Sam to follow, since the class of those who have learned to live "gracefully in idleness" is constantly on the increase. By the way, Solon was not the originator of this unique law, which went out of existence shortly after his death. The man who had the "happy thought" first was a certain King Amasis, who, before he became monarch, was by turns soldier, freebooter, and vagrant, living on the plunder he gained from others. He probably based the law on his own experience, not desiring to have his subjects idle and lawless, as he once was.—*Christian Herald*.

An Unceremonious Call. English judges on the bench are nothing if not ceremonious, but that American tradition is less so was exemplified recently in the staid and gloomy courts of the King's bench division, where Justice Banks was hearing a case.

Suddenly, to the surprise of all present and to the horror of the ushers and the black-robed officials, the court-room door was flung open and a man came in breezily, and, crossing the court, stepped up to the bench, where his lordship was studying some legal documents.

The ushers, manifestly scandalized, did not know whether to faint, call the police or rush after the audacious intruder.

While they were hesitating, the latter approached Justice Banks, to whom he handed a visiting card.

Then, to the further stupefaction of the officials, his lordship smiled, bowed

cordially, held out his hand, and invited the man to take a seat beside him on the bench.

Later it was learned that the caller was Judge E. Henry Lacombe, of the United States circuit court of appeals, who was utilizing his trip to London to see some of the English courts and study English procedure in practical operation.

The British and American judges soon were on the best of terms, and the action, one concerning a dispute between auctioneers as to the tenancy of certain buildings, seemed to interest Judge Lacombe very keenly, for he and his confrere discussed with animation several points of English laws that were brought out.

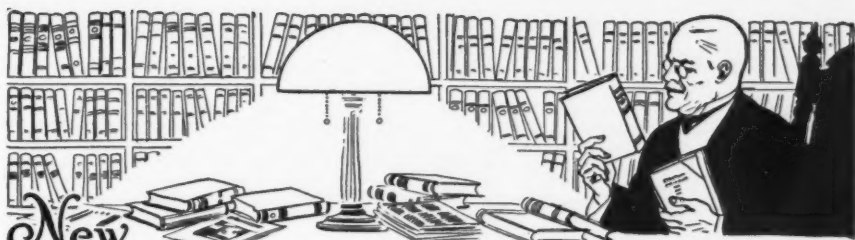
Afterward Justice Banks invited Judge Lacombe to luncheon in the former's room, and introduced him to the other justices of the high courts, and conducted him over the buildings.

Judge Lacombe was highly delighted with the cordial welcome given to him, but the court officials still are dazed and probably are wondering whether the world is not really coming to an end when men not only walk up to the bench, but are received by "My Lud" with open arms.—*The Hamilton Spectator*.

Pie and Cake as Necessities. Could the American small boy grow up without proper nourishment in the form of cake and pie? The Minnesota Railroad and Warehouse Commissioners, who were boys themselves once, say emphatically "no."

"Pie and cake are a household necessity," said the commission to-day in a letter to D. S. Elliott, president of the Great Northern Express Company. Mr. Elliott wanted to know the proper rate on shipments of bakery goods, which include consignments of cake and pie. He questioned whether they should not take a higher rate than bread alone.

"Man does not live by bread alone," the commission rules. Pie and cake are just as necessary to growing boys and girls as bread. This is shown by the fact, said Commissioner C. E. Elmquist to-day, that bakers cannot get bread orders in many of the small towns unless they send pies and cakes along with the bread to "satisfy the higher nature."—*Minneapolis Journal*.



New Books and Recent Articles

Human thought is the process by which human ends are ultimately answered.—Webster.

"The Anti-Trust Act and the Supreme Court." By Hon. William H. Taft (Harper & Brothers, New York). \$1.25 net.

Very timely and authoritative is this volume, in which former President Taft discusses in all its bearings the Sherman Anti-Trust Law, the proposed amendments to it, the effect of its decisions upon business in the past, and its probable influence in the future. He emphasizes the necessity of an independent judiciary to uphold popular government, and explains some of the famous decisions of the Supreme Court in the cases of the Addystone Pipe Company, the American Sugar Refining Company, the Meat Packers' Trust, the Standard Oil Trust, the American Tobacco Trust, etc. He corrects popular errors in regard to the effect of the decrees in the famous anti-trust cases, which have resulted, he believes, in restoring competition, and concludes with the optimistic expression that "if the law interpreted by the Supreme Court remains on the statute book, it will continue to free business from its real burdens.

"Property and Contract in Their Relations to the Distribution of Wealth." By Richard J. Ely, Ph. D., LL. D. (The MacMillan Company, 66 Fifth Avenue, New York). 2 vols. \$4.00 net.

Professor Ely has presented us with a splendid discussion of both the legal and the economic aspects of those fundamental questions that have to do with property. His book deals with topics on which the author daily lectured, and his ripened thought has had the added advantage of the stimulus of the classroom.

The author states that he has endeavored to resist the temptation to drift away from the economic point of view into a study of purely legal questions. He has sought to avoid making a law book, his contribution being the philosophy that has been evolved in spite of the courts.

After introductory chapters defining and describing Distribution, the author treats of Public and Private Property as the first fundamental institution in the distribution of wealth. This is followed by a treatment of the topics

of Contract and its Conditions, of Vested Interests and Personal Conditions.

Professor Ely's reputation as one of America's most distinguished economists is sustained and augmented by the value and thoroughness of this important work.

"The Doctrine of Judicial Review." By Edward S. Corwin (Princeton University Press, Princeton, N. J.) \$1.25 net.

This volume takes its name from the principal essay contained in it. The author's inquiries are directed to a consideration of the exact legal basis of the power of the Supreme Court to pass upon the constitutionality of acts of Congress. He presents "judicial review as the outcome of a view of legislative power which arose in consequence of the astonishing abuse of their powers by the early state legislatures, but which was first appreciated for its full worth by the Convention that framed the Constitution of the United States." He combats that theory of judicial review which rests on the idea that a legislative measure contrary to the Constitution is not law and never was. The writer contends that the power of judicial review rests upon certain general principles which were embodied in the Constitution, because of the Convention's comprehension of the principle of the separation of powers in relation to a written constitution, regarded as law in the true sense of the term, i. e. a source of rules enforceable by the courts.

The study entitled "We, the People," deals with the time-honored controversy over secession and nullification.

"The Pelatiah Webster Myth" is the subject of the third essay.

The article on the "Dred Scott Decision" treats of a dramatic episode in the history of judicial review.

"Some Possibilities in the Way of Treaty-Making" considers the recent extension of treaties to all matters of "genuine international concern, which is giving rise to an international police power, and the development of uniform national legislation of a social character.

"Addresses of Hon. U. M. Rose," with a brief memoir by George B. Rose. (George I. Jones, Publisher, 202 South Clark St., Chicago). \$3.00.

In this work a number of the addresses of the late Judge U. M. Rose, of Little Rock, are presented, and they are introduced by a brief but charming memoir contributed by his son, Mr. George B. Rose.

Judge Rose was one of the great lawyers of the United States, and justly enjoyed a national reputation. He was not only a jurist, but during the course of a long and studious life found time to acquire an almost unparalleled store of general learning. He widely explored the attractive fields of the world's literature, history, science, art, philosophy, and government. He was conversant with several languages, and had traveled extensively.

Judge Rose's addresses, delivered on various public occasions and before bar associations, are remarkable for their elevated and sustained thought and the classic elegance of their style. There is about them a refreshing clearness of diction, wealth of information, and felicity of expression that will make them of perennial interest.

"Where the People Rule." By Gilbert L. Hedges (Bender-Moss Company, San Francisco).

The initiative and referendum, direct primary law, and the recall, in use in the state of Oregon, are fully described in this book, the purpose of which is to show what these laws are, how they operate, and what results have been obtained by their use.

The author points out that the frequency of special elections under this system has a tendency to make electors indifferent, thereby leaving the determination of such elections to a minority. He recommends compulsory voting as a remedy.

"Any criticism of these measures," says Mr. Hedges, "must be with the understanding that they are yet in their infancy; and what the future holds in store for the citizens of the state of Oregon, no man can tell. This is certain: the people believe they have taken a long step forward in an attempt to make their state government more responsive to the popular will. They cannot now retreat if they would, nor do they care to."

The author has presented, in an interesting and instructive way, the practical operation

in his state of these great means of popular government.

"A Handbook of Stock Exchange Laws." By Samuel P. Goldman (Doubleday, Page & Co., New York.) \$1.00 net.

The object of this work is to define the rights and privileges of investors and speculators; to explain the duties and responsibilities of brokers; and to establish the usefulness of the Stock Exchange. It consists of a general statement of the law, so made as to be serviceable to stockbrokers as a guide in the pursuit of their occupation, and to provide a ready handbook from which members of the legal profession can easily get the leading cases and principles applicable to those matters which are most frequently the subject of conference with their clients.

A table of cases and index accompany the work.

"Colorado Code Annotated and Supreme Court Rules." Black Flexible Leather, \$5.00.

"1914 Supplement to Colorado Code and Statutes Annotated." Sheep, Buckram and Black Flexible Leather, \$3.50.

"Courtright's Colorado Statutes." 1914 Edition. Colorado Statutes to date (Code not included). Supplement bound in back. 1 Vol. Buckram, \$10.00.

"1914 Supplement to Courtright's Colorado Statutes." \$1.50.

"Courtright's Colorado Digest." (Covering Colorado 1-56, inc., and Appeals 1-25, inc.). By R. S. Morrison and George S. Berry. 2 Vols. Sheep and Buckram, \$22.50.

"Park's Georgia Code Annotated." (Revised through 1914). 7 Vols. Buckram, \$8.50 per volume.

"Outlines of International Law." By Charles H. Stockton. \$2.50.

"Carroll's Kentucky Statutes." (Annotated.) 2 Vols. \$15.00.

"Thum's Supplement to the 1909 Kentucky Statutes." \$5.00.

"1914 New Mexico Compiled Laws Annotated." By Hon. Stephen B. Davis and Judge M. C. Mechem. Buckram and Sheep, \$15.00.

"Bowers on the Law of Waiver." Sheep and Buckram, \$6.00.

"Bender's War Revenue Law, 1914." (The Emergency Revenue Act of 1914.) Annotated. Buckram, \$2.00.

"McMahon's War Revenue Law of 1914." (The Emergency Revenue Act of 1914.) Annotated. Buckram, \$2.00.

Recent Articles of Interest to Lawyers

Aëronautics.

"Aërial Fox and Geese."—Scribner's Magazine, November, 1914, p. 659.

Aliens.

"The Japanese Question."—48 American Law Review, 698.

Animals.

"For Love of Animals."—The Fra, November, 1914, p. 62.

Arbitration.

"The Advance Made by Treaties of Arbitration."—24 Yale Law Journal, 56.

Attorneys.

"The Etiquette of the Temple."—26 Green Bag, 409.

"The High Cost of Legal Service."—26 Green Bag, 408.

- "Points in Legal Ethics."—18 Law Notes, 150.
- "The Reorganization of Our Bar: A Proposal."—9 Illinois Law Review, 175.
- "The Results of a Comparative Study of the Examination Questions Framed by State Boards of Bar Examiners."—24 Yale Law Journal, 34.
- Bankruptcy.**
- "Life Insurance Policies in Bankruptcy."—25 American Legal News, 5.
- Banks.**
- "The Law of Banking."—31 Banking Law Journal, 767.
- "Modern Banking and Trust Company Methods."—31 Banking Law Journal, 773.
- "The Future of State Institutions under the Federal Reserve Act."—19 Trust Companies, 275.
- Bills and Notes.**
- "The Negotiable Instruments Law."—31 Banking Law Journal, 733.
- Biography.**
- "A Great Economist, Dr. Charles R. Van Hise."—The Fra, November, 1914, p. 37.
- "Gustave Le Bon."—The Fra, November, 1914, p. 43.
- Buildings.**
- "Better Homes."—The Fra, October, 1914, p. 20.
- Commerce.**
- "Our Opportunity."—The Fra, October, 1914, p. 6.
- "The Trade Opportunity of the United States."—Scribner's Magazine, November, 1914, p. 638.
- "The Evolution of Federal Regulation of Interstate Rates: The Shreveport Rate Cases."—28 Harvard Law Review, 34.
- Constitutional Law.**
- "Legislative Power in Canada."—50 Canada Law Journal, 556.
- "The Constitutionality of Statutes Forbidding Advertising Signs on Property."—24 Yale Law Journal, 1.
- "An Examination of Godcharles & Co. v. Wigeman." (Constitutionality of statute requiring employers to settle with employees at least once a month and to pay them in money or cash order.)—18 Dickinson Law Review, 91.
- Corporations.**
- "Diligence of Directors in the Management of Corporations."—3 California Law Review, 21.
- "Important Decision in Corporation Law."—25 American Legal News, 17.
- Courts.**
- "The Law of the Case."—79 Central Law Journal, 280.
- "A Model County Court."—3 California Law Review, 1.
- Covenants and Conditions.**
- "The More Common Defenses in Actions to Enforce Observance of Restrictive Covenants on the Use of Real Property."—20 Virginia Law Register, 502.
- Elections.**
- "Do Women Vote?"—3 National Municipal Review, 663.
- "Constitutionality of Primary Election Law."—7 Lawyer and Banker, 350.
- Evidence.**
- "The Relation of Light to the Proof of Documents."—18 Law Notes, 147.
- "The Identity of Typewriting."—7 Lawyer and Banker, 328.
- Fiction.**
- "The Necessity of Being Irish."—Scribner's Magazine, November, 1914, p. 647.
- "Knives and Forks."—Scribner's Magazine, November, 1914, p. 668.
- Foreign Countries.**
- "Norway and the Norwegians from an American Point of View."—Scribner's Magazine, November, 1914, p. 614.
- Fright.**
- "Shock as Being Actionable in Negligence."—50 Canada Law Journal, 567.
- Habeas Corpus.**
- "Justice Demanded for Harry K. Thaw." (Habeas corpus to secure release from imprisonment under extradition proceedings)—7 Lawyer and Banker, 317.
- Husband and Wife.**
- "Ante-Nuptial Contracts; Their Origin and Nature."—24 Yale Law Journal, 65.
- Incompetent Persons.**
- "Effect of Superstitious Beliefs or Insane Delusions upon Competency."—21 Case and Comment, 459.
- Initiative, Referendum, and Recall.**
- "Municipal Initiative, Referendum and Recall in Practice."—3 National Municipal Review, 693.
- Insanity.**
- "The Latest Discovery."—The Fra, November, 1914, p. 50.
- Justice.**
- "The Law's Attainment of Intellectual Justice."—21 Case and Comment, 479.
- Law and Jurisprudence.**
- "What Constitutes 'Practicing Law'?"—25 American Legal News, 23.
- "The Need for a Science of Law."—48 American Law Review, 714.
- "The Law of the Land."—48 American Law Review, 641.
- "Law and Equity in Upper Canada."—63 University of Pennsylvania Law Review, 1.
- "A Bibliographical Introduction to the Study of Chinese Law."—26 Green Bag, 399.
- Mansfield.**
- "Mansfield's Judicial Services."—26 Green Bag, 389.
- Master and Servant.**
- "Workmen's Compensation Laws."—79 Central Law Journal, 316.
- "Some Recent Decisions under the Workmen's Compensation Acts of Massachusetts and Michigan. Part I."—14 Columbia Law Review, 563.
- Monopoly.**
- "The Maintenance of Uniform Resale Prices." (Right of producer of patented, copyrighted, or trademarked article to regulate price at which article is to be resold.)—63 University of Pennsylvania Law Review, 22.

Municipal Corporations.

"Recent Legislation Relating to Municipal Indebtedness in Massachusetts."—3 National Municipal Review, 682.

Negligence.

"Proximate Cause, and Last Clear Chance."—21 The Bar, 15.

Occultism.

"Witchcraft in Certain Legal and Medical Relations."—21 Case and Comment, 439.

"Legal Status of Seers and Necromancers."—21 Case and Comment, 445.

"Law and Apparitions."—21 Case and Comment, 453.

"The Supernatural Test of Law."—21 Case and Comment, 474.

"The Return of Herndon Earle."—21 Case and Comment, 484.

Parent and Child.

"Rights of Adopted Children."—9 Illinois Law Review, 149.

Practice and Procedure.

"The Stopping Point in Litigation."—79 Central Law Journal, 333.

"Amendments to the Federal Practice Code of the United States."—13 Oklahoma Law Journal, 137.

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"Law Relating to a Right of Privacy."—7 Lawyer and Banker, 336.

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"The British Naval Prize Court."—18 Law Notes, 153.

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"The Necessity for a Public Defender."—21 Case and Comment, 468.

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"Property Exempt from Local Assessment."—19 Dickinson Law Review, 1.

Public Lands.

"Some Recent Decisions Involving Federal Land Patents."—3 California Law Review, 14.

Records and Recording Laws.

"Report of the Committee on the Torrens System and Registration of Title to Land."—20 Virginia Law Register, 481.

Release.

"Defective Releases."—7 Lawyer and Banker, 371.

Story.

"The Place of Judge Story in the Making of American Law."—48 American Law Review, 676.

Surrogates.

"The Surrogates' Courts Act. Part II."—9 Bench and Bar, N. S., 244.

Terminology.

"The Terminology of Legal Science (with a Plea for the Science of Nomothetics)."—28 Harvard Law Review, 1.

Torts.

"Proximate Consequences in the Law of Torts."—28 Harvard Law Review, 10.

Trade Commission.

"The Federal Trade Commission."—24 Yale Law Journal, 43.

Treaties.

"The Neutrality of Belgium."—50 Canada Law Journal, 553.

Trial.

"The Trial of Jesus."—7 Lawyer and Banker, 358.

Venue.

"The Rules of Venue, and the Beginnings of the Commercial Jurisdiction of the Common Law Courts."—14 Columbia Law Review, 551.

Waiver.

"The Extension of the Right of Waiver."—14 Columbia Law Review, 571.

War.

"Thoughts on this War."—Scribner's Magazine, November, 1914, p. 559.

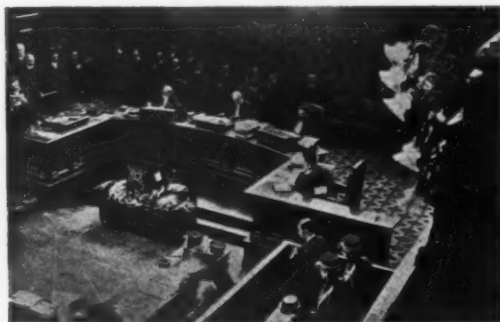
"Who Will Feed the World?"—The Fra, October, 1914, p. 28.

Waters.

"The Water-Power Problem in the United States."—24 Yale Law Journal, 12.

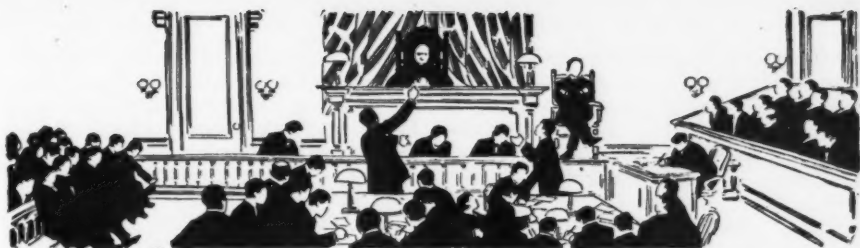
Wills.

"Wills and Ghosts."—21 Case and Comment, 464.



—Photo from Brown Bros. New York.

BRUSSEL'S LEGATION MURDER TRIAL



Judges and Lawyers

A Record of Bench and Bar

American Bar Association

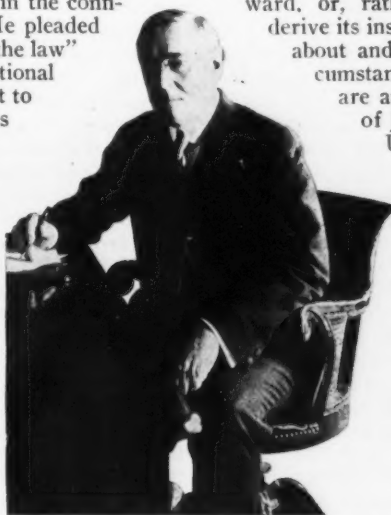
WITH an address of welcome by President Wilson, with ex-President Taft in the chair, and the entire Supreme Court sitting as guests of honor, the American Bar Association began its annual session in Washington, D. C., on October 20th.

In his introduction of President Wilson, Mr. Taft said the American people were back of the President in his handling of the international situation, and that he had the confidence of the nation.

President Wilson's response was that his strength rested in the confidence of the people. He pleaded for the "humanizing of the law" in this time of international crisis, not only in respect to international law, but as to municipal law. He added that the unsettled world conditions made this a good time for freeing the law from the dry consideration of cold precedents, and injecting into it more of the viewpoint of justice for the ordinary man. "Citations seem to play a much larger role now than principle," continued President Wilson. "There was a

time when the thoughtful eye of the judge rested upon the changes of social circumstances and almost palpably saw the law arise out of human life. Have we got to a time when the only way to change law is by statute? The changing of law by statute seems to me like mending a garment with a patch; whereas law should grow by the life that is in it, not by the life that is outside of it. I should hate to think that the law did not derive its impulse from looking forward rather than from looking backward, or, rather, that it did not derive its instruction from looking about and seeing what the circumstances of men actually are and what the impulses of justice necessarily are.

Understand me, gentlemen, I am not venturing in this presence to impeach the law. For the present by the force of circumstances I am in part the embodiment of the law, and it would be very awkward to disavow myself. But I do wish to make this intimation, that in this time of world change, in this time when we are going to find out just how,



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PRESIDENT WILSON

in what particulars, and to what extent the real facts of human life and the real moral judgments of mankind prevail, it is worth while looking inside our municipal law, and seeing whether the moral judgments of mankind are made square with every one of the judgments of the law itself. For I believe that we are custodians, not of commands, but of a spirit. We are custodians of the spirit of right-



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EX-PRESIDENT TAFT

eousness, of the spirit of equal-handed justice, of the spirit of hope which believes in the perfectibility of the law with the perfectibility of human life itself.

"You cannot go any faster than you can advance the average moral judgments of the mass, but you can go at least as fast as that, and you can see to it that you do not lag behind the average moral judgments of the mass.

"I have in my life dealt with all sorts and conditions of men, and I have found that the flame of moral judgment burned just as bright in the man of humble life and limited experience as in the scholar and the man of affairs. And I would like his voice always to be heard, not as a witness, not as speaking in his own case, but as if he were the voice

of men in general, in our courts of justice, as well as the voice of the lawyers, remembering what the law has been. My hope is that, being stirred to the depths by the extraordinary circumstances of the time in which we live, we may recover from those depths something of a renewal of that vision of the law with which men may be supposed to have started out in the old days of the oracles, who communed with intimations of divinity."

Ex-President Taft's Address.

"We are the principal nation," said Mr. Taft, "and I might say almost the only nation, of the Christian world not so related to the struggle that both sides may really regard us as disinterested friends. It is our highest duty, and the President makes plain his appreciation of this, not to sacrifice and destroy this great leverage for successful mediation, when the opportunity arises, by ill-advised and premature judgments upon the merits. We must hold our tongues to be useful to mankind.

"And now that we are discussing compliance with treaties, and the effect of treaties of arbitration and of peace upon the chances of war, is it not a good time for us to clean our own house, and to put ourselves in a position where we can fulfil the letter every treaty we have entered into? We have made many treaties of friendship and peace—indeed, treaties with all the world—in which we have assured to aliens, subjects or citizens of the other party to the treaty, resident within our borders, due process of law in protection of life, liberty, and property. But we now withhold, however, from the same authority that makes the treaty, the power to fulfil its obligations. A statute of a dozen lines would put it into the power of the President to institute judicial proceedings, civil and criminal, in courts of the United States to punish a violation of the treaty rights of aliens, and enable him to use the civil and military executive arm of the government to protect against their threatened invasion. In our past experience we realize that mob violence committed through race prejudice against aliens will never be punished by state

authority, and there is nothing that a high-strung people—and it is peoples now who largely control the matter of war and peace—resents so much as the mistreatment of their fellow countrymen living under the flag of a foreign government that has stipulated and pledged its honor to give them protection.”

Turning to the anti-trust legislation of the Wilson Administration, Mr. Taft analyzed the Trade Commission act and the Clayton act.

“In so far as the field of general interstate trade is within the practical range of supervision and regulation,” he said, “the machinery adopted, it seems to me, is as effective as any could be.” With one minor exception, he added, the field of illegal and criminal effort in respect to restraints of interstate commerce is not enlarged under the new acts, which he characterized as in many respects merely declaratory of existing law. Regarding combinations of labor, he said:

“While the abuses of combinations of capital have properly aroused public alarm and evoked the most stringent laws to suppress them, the abuses growing out of the enormous power of combinations of labor, which have been also manifest, have not evoked the same regulative legislative tendency. Persons subjected to illegal invasion of their rights by labor combinations have sought to protect themselves in their business and property in courts of justice, and in many instances this has been effective. Litigation of this kind has not always resulted in right decision. Courts are a human instrument and they sometimes err, but a very few instances of error or injustice against trades unions have been a sufficient basis to arouse great and disproportionate complaint, and to bring to bear the most weighty political influence upon legislatures to pass laws to prevent their recurrence even if those laws are calculated to create a special class of litigants and to render them immune from the ordinary remedial process in court to which every other citizen is subject. Now there has been a strong movement, and a most beneficial one, to give equality of opportunity to wage-earners in their struggle for a livelihood and their pursuit of happiness, and this movement

has been greatly promoted by the direct efforts of labor combinations and their political influence. Without such combination, we may well doubt whether the present condition of the wage-earner would be anywhere near so good as it is to-day.”

Senator Root's Address

At the evening session of the Bar Association Senator Elihu Root spoke on



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HON. ELIHU ROOT

“The Layman's Criticism of the Lawyer.” Mr. Root said he thought “we must concede there is room for improvement in the administration of the law in this country.” Answering his own question as to what the bar might do to improve the

situation he said in part:

“First, we can improve our lawmaking. We make too many laws. According to a count made in the library of Congress our national and state legislatures passed 62,014 statutes during the five years from 1909 to 1913 inclusive. During the same five years, 63,379 decisions of the national and state courts of last resort were reported in 630 volumes.

“Many of these statutes are drawn carelessly, ignorantly. Their terms are so vague, uncertain, doubtful, that they breed litigation inevitably. They are thrust into the body of existing laws without anybody taking the pains to ascertain what the existing laws are, what decisions the courts have made in applying and interpreting them, or what the resultant forces will be when the old laws and the new are brought together.

“We are coming very much into the habit of a *priori* legislation, passing laws which somebody has conceived or reasoned out because they seem all right theoretically.

"All this mass of ill-considered, badly drawn, experimental, first-impression legislation with which the country is flooded from year to year causes innumerable litigations, which clog the calendars of the courts, occupy the time of the judges, and delay the disposition of other litigation. It creates new questions faster than the courts can decide old ones.

"Of course, all this is not a matter to be dealt with by lawyers at the bar. Courts cannot apply the remedy, nor can lawyers as officers of the courts. But lawyers probably make up the majority of every legislative body in the United States, and, moreover, the opinions of lawyers in their own communities on such a subject as this will have a great effect in forming the public opinion which controls legislatures.

"There are certain specific measures by which American legislation can be greatly improved. One is the establishment of a reference library for the use of each legislative body. Another is the establishment of a drafting bureau or employment of expert counsel, subject to be called on by the legislature and its committees, to put in proper form measures which are desired, so that they will be drawn with reference to previous legislation and existing decisions of the courts, and will be written in good English, brief, simple, clear, and free from ambiguity and inconsistency.

"There is a useless lawsuit in every useless word of a statute."

"Another thing the bar can do," he continued, "is to simplify the procedure of our courts.

"A multitude of controversies about statutory rights intervene between the suitor's demand for redress and his final judgment. There is a premium on shrewd, ingenious, shifty attorneys. There is no necessity for all this bedeviling of our practice by law. A short and simple practice act in each jurisdiction—such as some states have already—is all that is necessary. The courts want to do justice, and they will if they are permitted to.

"There is no country of the world in which rules for the exclusion of evidence are applied with the rigidity and

technicality obtaining in the United States. Our trial practice in the admission and exclusion of evidence does not agree with the common sense, the experience, or the instincts of any intelligent layman in the country. As a consequence, while we are aiming to exclude matters which our rules declare to be incompetent or irrelevant or immaterial, we are frequently also excluding the truth."

Address of Canada's Chief Justice.

Canada's pride in being a part of Great Britain, a nation which "keeps sacred its

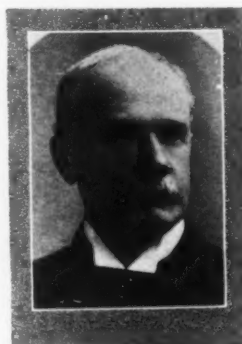


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SIR CHARLES FITZPATRICK

plighted word," was asserted by Sir Charles Fitzpatrick, Chief Justice of the Dominion of Canada, in an address on "The Constitution of Canada," which was the feature of the Wednesday evening ses-

sion. In describing the growth of the Canadian colonial system, Sir Charles commented upon the German system of colonization.

"The German government," said he, "apparently has not discovered that there can be no colonial enterprise where the colonist is checked at every turn by official limitations, and this may account for the fact that the German emigrant to-day selects the United States, Canada, or Australia as a field for his enterprise."

The speaker said some Americans inquire why a people of their same blood and lineage were content to remain in what they thought was a position of political inferiority and dependency.

"This inquiry arises, I think, out of the misconception of our relationship to the British Crown," he said. "You would not, perhaps, say that the political status of an Englishman or Scotchman was less free and independ-

ent than your own, but our position, you think, is different. On the contrary, we recognize no inferiority in ourselves, nor in our political position to that of the Englishman or the Scotchman."

Address of Ambassador Naón.

Ambassador Naón, of the Argentine Republic, who recently acted as one of



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AMBASSADOR NAÓN

effect in the social development of the people.

Mr. Naón pointed out that his country "was the first to strive for the success of a formula establishing compulsory arbitration without limitations."

Pointing to a broad international humanitarianism as a constitutional idea in Argentina, the Ambassador asserted that "the Constitution and the laws have declared the principle that foreigners enjoy in the territory of the nation all the civil rights of a citizen," and that, "in the same manner that the principle of democracy is the foundation of our political organization, the sentiment of international democracy is the foundation of our international policy."

This humanitarianism had shown itself, he said, at the end of the war with Paraguay, when Argentina, which was "in a position to impose its will upon the defeated country and fix the boundary line between the two countries, refused to take advantage of her incontrovertible superiority, and even of the much vaunted rights of the victor, and, in a spirit of lofty generosity, acclaimed to the world the phrase that has ever since epitomized her policy: 'Victory

gives no rights.' A few days later a treaty of arbitration was signed, submitting the determination of the boundary line to the decision of an impartial judge, the President of the United States.

"'Victory gives no rights,' is the highest expression of our aspiration."

Judicial Recall.

Concerning the status of judicial recall agitation, the committee to oppose judicial recall reports in part as follows:

"A perceptible change in sentiment toward the judicial recall is slowly but surely showing itself among the people of the different states. In many localities its true nature is not yet understood. In most states the average voter has, as yet, insufficient appreciation of its baneful character. The work of education must be continued. The signs, however, of increasing enlightenment, due to persistent efforts of its opponents, are everywhere apparent. Former leading advocates of judicial recall are saying less about it. Some of them are now saying nothing about it. Some have apparently given up the idea of the recall of judges, and have turned to the judicial decision recall as a substitute. Others, more adroit, have apparently given up both the recall of judges and the recall of judicial decisions, and have retreated to positions less antagonistic to constitutional democracy."

Injunction Legislation.

Injunction legislation before the present Congress receives extended treatment by the committee in charge of this subject. The provision limiting injunctions in labor disputes, originally incorporated in the anti-trust legislation of the House of Representatives, and later amended by the Senate, is criticised by the committee, which says:

"The provision distinctly requires the court to apply in controversies in labor cases a different rule from that which is applied in other cases. To give special privileges to any class of men is opposed not only to the Declaration of Independence, but to the whole theory of our government. On this point all parties agree.

"Can it have occurred to the gentle-

men who propose this legislation that if the courts cannot decide these controversies peaceably they will be decided by force? The shocking results of the latter method we see plainly in Colorado. Would it not have been better to have the questions which have given rise to bloodshed there decided in an orderly manner by the Colorado courts? "Your committee is not opposed to organized labor. We freely concede to laboring men the same right to organize that their employers possess. We are persuaded that in opposing the proposed legislation we are the true friends of both."

The Panama tolls question and Japanese immigration are referred to in the report of the Committee on International Laws, as follows:

"The discussion arising between the United States and Great Britain and other countries as to free tolls for coasting vessels of the United States has been amicably terminated by the repeal of the free tolls by Congress by a statute carefully worded to prevent the loss of any rights of the United States.

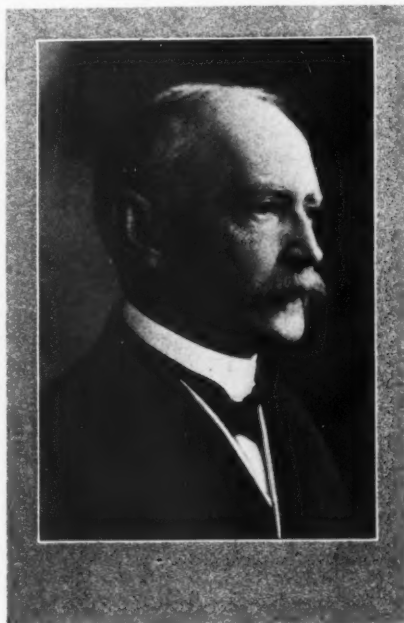
"Our relations with Japan continue to be disturbed by the denial by some states of this Union of certain rights claimed by her nationals. It is respectfully submitted that like all matters of foreign relations this matter must, by the rules of the Constitution and of expediency alike, be controlled and adjusted by the Federal authorities as the interest of the whole country may seem to require."

The International Law Committee also approved the proposed international conference for the unification of laws relating to bills of exchange.

Bankruptcy.

The Committee on Commercial Law reports in favor of the continuance of the national bankruptcy act, and opposes all legislation to repeal the act. Simplicity and clearness of laws, so as to be

understood by the average citizen, are strongly urged by the special committee on legislative drafting. It refers in this connection to the "crowning monstrosity of the income tax act," with its "involved phraseology, and no attempt whatever at orderly arrangement." The formal defects of the act are pointed out under nine heads, one of them showing "certain sentences so worded as to make no sense, if literally interpreted." The officers of the Association for the ensuing year are: President Peter W. Meldrim, Savannah, Ga.; Secretary,



PETER W. MELDRIM

Newly Elected President American Bar Association

George Whitelock, Baltimore, Md.; Treasurer, Frederick E. Wadhams, Albany, N. Y. The Assistant Secretaries elected by the Executive Committee are: W. Thomas Kemp, Baltimore, Md. and Gaylord Lee Clark, Baltimore, Md. The Executive Committee is as follows: The President, Secretary, Treasurer and William H. Taft, ex officio; also John H. Voorhees, Sioux Falls, S. D.; William H. Staake, Philadelphia, Pa.; William H. Burges, El Paso, Tex.; William C. Niblack, Chicago, Ill.; Selden P. Spencer, St. Louis, Mo.; William P. Bynum, Greensboro, N. C.; Chapin Brown, Washington, D. C.



"He who administers medicine to the heart in the shape of wit and humor is most assuredly a good Samaritan."

Caseneuve's Rival. Although the French courts are conducted with more ceremony than our own, they are occasionally enlivened by amusing incidents.

Maitre Caseneuve, a famous advocate of Toulouse, long since dead, had a pet dog of which he was very fond. One day he ventured to take this dog, which was small, and named Azor, into court with him. He seated Azor at one end of the bench assigned to the counsel, and began an argument.

Maitre Caseneuve had a high-pitched voice, and as he warmed up with his plea, he raised it to a loud tone. Azor could stand it no longer. He stood up on the bench and howled.

Maitre Caseneuve moderated his voice, and cuffed the dog "aside," whereupon Azor subsided into silence. The lawyer argued on, and by and by, forgetting himself in his earnestness, raised his voice once more to a high pitch and a loud tone.

"Wow! wow! wow!" howled the little dog, once more.

This time the lawyer stopped short, turned to the dog, and eyed him severely.

"See here, Azor," he said aloud, "this can't go on. If you are arguing this case, you'd better do it alone; but if I am, then you've got to keep still!"

After that Azor held his peace.

Too Close a Cut. As everybody knows, an English judge wears in court a great wig and a gown, and is addressed as "my Lord." Public sentiment scarcely allows him to unbend, even out of court. Nevertheless, sometimes he does unbend.

It is related that Sir Henry Hawkins,

who was so prominent in the prosecution of the famous Tichborne claimant, and who was afterwards a famous judge, was in the habit of wearing his hair extremely short.

He was once waiting for a train at the Epsom railway station on a race day, and a number of roughs came in. One of them behaved very badly to the judge, who remonstrated with him; and thereupon the rough invited Sir Henry to come out and "have it out with him."

The judge reflected that, as the men appeared to be of the criminal classes, some of the party might have appeared before him, and would know him. So he took off his hat and said:

"Perhaps you do not know who I am."

His assailant looked at the closely cropped head, and edged off, "S' help me, Bob!" he exclaimed, "a bloomin' prizefighter! Not me!"

The judge was not molested further.

On another occasion, Sir Henry on a ramble between assizes with a companion, stopped at a wayside inn, and joined in a game of skittles with two rustics. In an unguarded moment the judge took off his moleskin cap. One of the rustics, after eyeing him suspiciously, turned to go away.

"I don't mind being neighborly," said he, "but I'm hanged if I am goin' to play skittles with a ticket-of-leave man!"

Time to Change His Mind. A gentleman who once served on an Irish jury tells an amusing story of his experiences. When the hearing was over and the jury retired to their room to consider their verdict, they found that they stood eleven to one in favor of an acquittal, but the

one happened to be a very complacent old gentleman who rested his chin upon the head of a thick bamboo cane, and announced defiantly that he was ready to stay there as long as any of them.

The hours dragged on, evening arrived, and the old gentleman obstinately held out. The other jurors wearily arranged themselves to make a night of it. From time to time the old gentleman would contemplatively suck the head of the cane.

Finally he fell asleep, and the cane dropped heavily to the floor. Then one of the jurymen picked it up and found, to his surprise, that it was nearly full of Irish whisky. The eleven passed the cane around, relieved it of its contents, and then awakened its slumbering owner. Slowly he lifted the cane to his mouth, looked at his watch, and then arose with the announcement, "Boys, I'm afther changin' me moind."—Legal Laughs.

Covering the Case. Judge Gundy, of Atchison, tells this lawyer story: An Irish lawyer was attorney for a man charged with murder. "Your Honor, I shall first absolutely prove to the jury that the prisoner could not have committed the crime with which he is charged. If that does not convince the jury, I shall show that he was insane when he committed it. If that fails I shall prove an alibi."—Kansas City Journal.

She Had Witnesses. Every now and then Judge Mulqueen makes a pertinent comment on the advisability of those having eyes using them to see with, says the New York correspondent of the Cincinnati Times-Star. He especially directs his attention toward the magistrates on the city bench, most of whom are so bound by the thongs of custom that with all the will in the world to deal justly they often make serious mistakes. "I had a colored woman before me to-day as a complaining witness," said Judge

Mulqueen. "She had a man held for trial by a city magistrate on the charge that he had attacked her with a pair of scissors. 'He mout' near gouge mah eye out, Jedge,' she said to me. 'Jes' come at me lak a lion, he did, a-roarin,' suh. He poke me in de face wiv dem scissors, Jedge, not once, but four or five times. He jes' cut up mah face lak if it was a yahd of ribbon, Jedge. The magistrate what held him to dis heah court says he navah did hear tell of no more dang'rous man.'

"Then I looked her over. She had a wide, smooth, yellow face that didn't have a mark on it. I told her to repeat her story, and she went all over it again, telling how the man had slashed her face with that pair of scissors.

"'But madam, I said, 'there isn't a mark on your face.'

"'Marks!' said she, indignantly, 'Marks! What I care for marks; lem me ask you dat? I got witnesses, I tell you.'"—Minneapolis Journal.

In English Politics, Too. Election Agent—"Well, did you discover anything in Stump's past life that we can use against him?"

Detective—"Not a thing. All he ever did before he came here was to sell awnings."

Election Agent—"Why, that's just what we want. We'll say that he has been mixed up in some decidedly shady transactions."—London Tit-Bits.

A Unanimous Jury. Here is a story which Baron Douse, the celebrated Irish judge, once told in that exaggerated Irish "brogue" which he loved to employ. "I was down in Cork last month, holding assizes. On the first day, when the jury came in, the officer of the court said: 'Gentlemen av the jury, ye'll take your accustomed places, if ye plaze.' And may I never laugh," said the baron, "if they didn't all walk into the dock!"—Legal Laughs.



